Supreme Court, U.S.
FILED

No. 941268 JAN 3 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

JOINT SCHOOL DISTRICT NO. 241, BOARD OF TRUSTEES OF DISTRICT NO. 241; TRENT WOODS, Chairperson of said Board; AL ARNZEN, Superintendent,

Petitioners,

v.

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her two children, BEVERLY HARRIS BUTLER, and SAMUEL HARRIS,

Respondents,

v.

CITIZENS PRESERVING AMERICA'S HERITAGE, INC., an Idaho corporation; ANTOINE JESSEE HEATH; KARLA FREI; MAUREEN SLICHTER (by and through LEON SLICHTER, parent); CHAD GRAVES; GINA ENGLE; SHERRY COXEN (by and through JACK BREEN, guardian); MARIA LOWRY, by and through ROBERT LOWRY, parent); MIKE McCARLEY; and TINA LAWRENCE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES B. LYNCH
LYNCH, MOORE, BASKIN & PARKER
1607 W. Jefferson
Post Office Box 739
Boise, Idaho 83701
Telephone: (208) 336-6900

Counsel of Record for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

80 pp

QUESTIONS PRESENTED

1. May a school district allow the graduating senior class to decide the content of high school graduation ceremonies, including the inclusion or exclusion of non-secular material, without violating the Establishment Clause of the United States Constitution?

2. Does the inclusion of non-secular material in graduation ceremonies represent coercive state action if such material is included pursuant to a vote among graduating seniors and if the graduation program contains a disclaimer informing attendees that the school board neither endorses nor opposes the content of the graduation ceremonies?

LIST OF PARTIES

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit, which issued the order subject to this Court's review.

1. Petitioners Joint School District No. 241, Board of Trustees of District No. 241; Trent Woods, Chairperson of said Board; Al Arnzen, Superintendent, Defendant/Appellee in the Court of Appeals; and

2. Respondents Phyllis Wright Harris, on her own behalf and on behalf of her two children, Beverly Harris Butler, and Samuel Harris, Plaintiffs/Appellants in the Court of Appeals, and

3. Respondents Citizens Preserving America's Heritage, Inc., an Idaho corporation; Antoine Jessee Heath; Karla Frei; Maureen Slichter (by and through Leon Slichter, parent); Chad Graves; Gina Engle; Sherry Coxen (by and through Jack Breen, guardian); Maria Lowry, (by and through Robert Lowry, parent); Mike McCarley; and Tina Lawrence, Intervenors-Defendants/Appellees in the Court of Appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTRODUCTORY PRAYER 2

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY AND CONSTITUTIONAL PROVISIONS 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 8

CONCLUSIONS 15

APPENDIX ..... App. A-1

A. U.S. District Court Order Addressing Motions and Granting Intervenor-Defendants' Motion for Summary Judgment, filed May 20, 1993 (821 F.Supp. 638) ..... App. A-1

B. Opinion of the Panel, filed November 18, 1994 ..... App. B-1

C. *Jones v. Clear Creek Independent School Dist.*, 977 F.2d 963 (5th Cir. 1992) ..... App. C-1

TABLE OF AUTHORITIES

Page

CASES

Adler v. Duval County School Board, 851 F.Supp. 446 (M.D. Fla. 1994) 13

Harris v. Joint School District No. 241 et al., WL651111, (No. 93-35839, 9th Circuit 1994) ... *passim*

Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992) ..... *passim*

Lee v. Wei .nan, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) 8, 10, 11, 12

Lemon v. Kurtzman, 403 U.S. 602 (1971) 10

STATUTES

28 U.S.C. § 1254(1) 2, 4

28 U.S.C. § 1291 .....3, 4

28 U.S.C. § 1343(3) 2, 4

42 U.S.C. § 1983 3

U.S. Const. amend. I, § 1 4

U.S. Const. amend. XIV, § 1 4

No. _____

In The

Supreme Court of the United States

October Term, 1994

JOINT SCHOOL DISTRICT NO. 241, BOARD OF TRUSTEES OF DISTRICT NO. 241; TRENT WOODS, Chairperson of said Board; AL ARNZEN, Superintendent,

Petitioners,

v.

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her two children, BEVERLY HARRIS BUTLER, and SAMUEL HARRIS,

Respondents,

v.

CITIZENS PRESERVING AMERICA'S HERITAGE, INC., an Idaho corporation; ANTOINE JESSEE HEATH; KARLA FREI; MAUREEN SLICHTER (by and through LEON SLICHTER, parent); CHAD GRAVES; GINA ENGLE; SHERRY COXEN (by and through JACK BREEN, guardian); MARIA LOWRY, by and through ROBERT LOWRY, parent); MIKE McCARLEY; and TINA LAWRENCE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTORY PRAYER

Pursuant to Part III of the Rules of this Court, Joint School District No. 241 petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. This petition is presented in order to resolve a direct conflict between two United States courts of appeals and settle the law relating to the inclusion by students of non-secular materials into high school graduation ceremonies.

OPINIONS BELOW

The District Court opinion relevant to this petition and issued in support of its judgment is reported and appears in **Appendix A** hereto. The panel Opinion of the Ninth Circuit Court of Appeals issued in support of its judgment is reported and appears in **Appendix B** hereto. The Fifth Circuit case of *Jones v. Clear Creek Independent School Dist.*, 977 F.2d 963 (5th Cir. 1992), which is in direct conflict with the Ninth Circuit's opinion in the case at bar, is reported and appears in **Appendix C** hereto. Neither the Intervenors nor the Joint School District No. 241 filed a petition for rehearing or rehearing en banc.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Federal jurisdiction in the first instance was obtained pursuant to 28 U.S.C. § 1343(3) in the

District Court, and pursuant to 28 U.S.C. § 1291 in the Ninth Circuit Court of Appeals.

Jurisdiction is appropriate in this Court because of a conflict between the Ninth and the Fifth Circuit Courts of Appeal on the questions presented for review. On November 24, 1992, the Fifth Circuit Court of Appeals handed down its decision in *Jones v. Clear Creek Independent School Dist.*, 977 F.2d 963 (5th Cir. 1992). The Ninth Circuit Court of Appeals entered its Order and Dissent affirming in part and reversing in part the district court's decision in *Harris v. Joint School District No. 241, et al.*, on November 18, 1994. This petition is therefore timely under this Court's Rule 13.4.

STATUTORY AND CONSTITUTIONAL PROVISIONS

42 United States Code § 1983:

> Every person who, under color of any statue, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment:

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Federal jurisdiction in the first instance was obtained pursuant to 28 U.S.C. § 1343(3) in the District Court, and pursuant to 28 U.S.C. § 1291 in the Ninth Circuit Court of Appeals.

Jurisdiction is appropriate in this Court because of a conflict between the Ninth and the Fifth Circuit Courts of Appeal on the questions presented for review.

Grangeville, Idaho is the county seat of Nez Perce County and the central town serving a small farming community. Petitioner, Joint School District No. 241 is one

of many governmental units established by the Legislature of the State of Idaho to operate the school system and its affairs are managed by a Superintendent who reports to a Board of Trustees consisting of citizens elected by the residents of the district. For at least ten years, the school district has removed itself from involvement in graduation ceremonies. The district has conferred this function upon each year's graduating senior class. The class members decide, by taking a vote, issues such as 1) whether or not to have a graduation ceremony, 2) who, if anyone, to approach as speakers, 3) what music to play, and 4) whether or not to include non-secular material in the ceremony. There is no written policy imposed on the students by the school district as to how graduation is to be conducted. No implied restrictions are placed on the graduating seniors except that the ceremony be within the bounds of legality and safety. The students, not the school district personnel, contact the proposed speakers. If the students wish to influence or limit the topic presented by a speaker they may do so, if they can obtain the speaker's cooperation.

The district does not attempt to insure non-sectarian or non-proselytizing content of any non-secular material included in graduation. The district has no advance notice or opportunity to grant or withhold approval over the content of the graduation. Although Grangeville High School principal Judy Leuck on one occasion requested that all participants write down their presentations in order to improve the quality of the speeches, neither Ms. Leuck nor any other member of the school board or school district administration reviews the student speech to "pre-approve" or censor it.

Graduation is generally held on school district property, and the utilities are provided at no charge. If the students voted to hold graduation elsewhere, they would be free to do so. Students pay for the printed programs with funds raised by the senior class and with student activity fees designated for use by the senior class.

In November of 1990, the Superintendent of the Grangeville School District, Al Arnzen, distributed a memorandum to the three principals in this district reinforcing the school district's desire to remain neutral and to allow the students to dictate the content of graduation. The memorandum reads, in relevant part, as follows:

> I just want to make sure we are all doing the same thing for invocation and benediction at graduation. The school board is permitting invocation and benediction at graduation and not requiring Invocation and Benediction at graduation. These are the guidelines I want you to follow:
>
> 1. Let the senior students vote on whether they do or don't want Invocation and Benediction at graduation.
>
> 2. If the answer is yes, then they should vote on whether they do or don't want a minister or student to say the Invocation and Benediction.
>
> 3. If the students vote for a minister, then the students should vote on which minister they want to say the Invocation and Benediction.
>
> Make everything an option and let the students vote. We will dictate nothing to the students.

> If a student does not want to go to graduation, I would not force the issue. Give him/her the diploma after the graduation exercise.

Practices in the three district high schools have varied over the last four years. In 1990, the Grangeville High School senior class declined to include any non-secular music, prayer or speech. In 1992, the senior class voted to have a musical benediction without prayer. Last year, the Clearwater Valley High School seniors chose to have a moment of silence at the beginning of commencement rather than music or a benediction.

Since 1991, the school board has requested that the students include the following statement on the printed high school graduation program. To date, all graduating classes have complied with the district's request.

> The Board of Trustees of Joint School District No. 241 neither promotes nor endorses any statements made by any person involved in the graduation ceremony. The District endorses each person's free exercise of speech and religion and any comments or statements made during the graduation ceremony should not be considered the opinions or beliefs of the District, the Board of Trustees or the Superintendent.

On April 12, 1991, Phyllis Wright Harris filed suit in Idaho state court on her own behalf and on behalf of her three children, who were attending Grangeville schools at that time. She sought preliminary and permanent injunctive relief based upon claims of violations of the Federal Constitution and the Idaho Constitution with regard to establishment of religion. Mrs. Harris' oldest child left

Grangeville High before graduating, and her second oldest child has been dismissed from the suit. Her youngest child, Samuel Harris, remains a student at Grangeville High School, and is scheduled to graduate in spring of 1995.

Petitioners removed the case to the United States District Court for the District of Idaho. That court granted the application of Citizens Preserving America's Heritage, Inc. to intervene and pursue a counterclaim based on free speech violations. Ms. Harris and Citizens Preserving America's Heritage, Inc. filed cross motions for summary judgment. The district court postponed its decision until this Court decided the case of *Lee v. Weisman*, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

On May 20, 1993, following consideration of the *Lee v. Weisman* decision, presiding Judge Harold J. Ryan granted summary judgment in favor of Petitioners and Respondent Intervenors. Judge Ryan found no establishment clause violation in the school district's practices. Judge Ryan declined to rule on the state constitutional issues. Respondent Harris then appealed to the Ninth Circuit Court of Appeals, where Judge Ryan's order was reversed as to the Establishment Clause issue, but affirmed as to his decision not to reach the state constitutional issues.

REASONS FOR GRANTING THE PETITION

The questions presented are important because they address two fundamental issues: free expression of religious views and the constitutional prohibition on state-established religion. This case is even more appealing

because it embodies the unresolved questions in the context of a common community event; high school graduation. These issues touch people all over this nation as thousands of public high schools prepare for graduation each spring.

If this Court accepts the questions presented for resolution, students will know whether they have the right to express non-secular thoughts, sentiments or principles during an important milestone in their lives. Conversely, those who are offended by such expression will know whether they may find protection under the constitutional prohibition of state-established religion.

The facts in *Harris v. Joint School District No. 241 et al.*, WL65111, (No. 93-35839, 9th Cir. November 18, 1994), outlined in petitioner's Statement of the Case, closely parallel those in *Jones v. Clear Creek Independent School Dist.*, 977 F.2d 963 (5th Cir. 1992). In *Jones*, the defendant school district established a "Resolution" which provided for graduation to rest within the "discretion of the graduating senior class, with the advice and counsel of the senior class principal." *Jones* at 964. Students included a prayer at graduation and the *Jones* plaintiff sued on establishment clause grounds. Similarly, the Grangeville school district distanced itself from deciding "whether to have a prayer, who to select to say it, and how it is to be said." *Harris* at 14082.

Despite the similar fact patterns, the Ninth Circuit in *Harris* and the Fifth Circuit in *Jones* ruled in complete opposition to each other. A careful comparison of the major points of each opinion underscores the extent of the confusion and disagreement among the judiciary as to

how *Lee v. Weisman* should be applied in the context of student initiated graduation prayer.

Both courts applied the *Lemon v. Kurtzman* test, and pronounced contrary rulings on each element. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As to the secular purpose prong of *Lemon*, the Fifth Circuit found that an invocation or benediction spoken in conjunction with graduation served the secular purpose of solemnizing the occasion. *Jones* at 966. The Ninth Circuit believed "solemnization is insufficient in this case to secularize what is objectively and inherently religious." *Harris* at 14094.

As to *Lemon's* prohibition on government "advancing or inhibiting religion", the *Harris* court believed that "[t]he prayers said in this case are indistinguishable from those that might be said in a church service. If said there, no one would dispute that their intent and primary effect was to advance religion." *Harris* at 14094.

The *Jones* opinion rejected that reasoning, noting that the Resolution did not mandate a prayer or an invocation, but "merely permits one if the seniors so choose." *Jones* at 967. The *Jones* court found the Resolution "passive" in comparison to the actions of the principal in *Lee v. Weisman, supra*, who directed a member of an organized religion to give an invocation. *Jones* at 968.

The two courts displayed further disagreement in the manner in which they applied *Lee* to the establishment clause issue. The *Harris* decision characterized *Lee* as requiring "(1) state **involvement** and (2) the **obligatory** nature of the student's participation in the **religious activity** taking place at graduation." *Harris* at 14085. (Emphasis added.)

Jones characterized *Lee* as "repeatedly stress[ing] the government's direct and complete control over the graduation prayers there at issue as determinative of the establishment question." *Jones* at 970, *quoting Lee*, 112 S.Ct. at 2655. This seems a higher level of participation than mere "involvement" as is deemed sufficient by *Harris*.

Addressing the level of state control, the *Harris* court found the students had the authority to make decisions regarding graduation "only because the school allows them to have it . . . " *Harris* at 14086. The *Harris* court also found the school had "underwrit[ten] the event" by allowing use of a school building, allowing programs to be partially paid for with registration fees and by school officials attending the ceremony. *Id.* at 14086-87. On this basis, the court found graduation to be a "school-controlled, school-sponsored event . . . " *Id.*

In contrast, the *Jones* court found no government direction in the graduation prayers. The *Jones* opinion observed that the unconstitutional involvement in *Lee* occurred when a **school principal decided** that an invocation and benediction should be given. *Jones* at 970. The Resolution at issue in *Jones* did not decide whether an invocation will occur, but rather "respects the graduating class's choice on the matter." *Id.* The *Jones* court also noted that the Resolution said nothing of government involvement in the selection of the person who delivers any invocation. *Id.* at 971.

The *Harris* court did not analyze whether or not the graduation ceremony constituted a formal religious exercise, but simply assumed as much. The *Jones* court, on the other hand, noted that the Resolution does not require or

favor prayer, although it tolerates it. This prevented the graduation ceremony from becoming a formal religious exercise in the *Jones* court's opinion. *Jones* at 971.

The *Jones* court found no government pressure exerted on students to participate in the prayers at graduation. It noted that "all students, *after having participated in the decision of whether prayers will be given*, are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy." *Id.* at 971. (Emphasis in original.) The court further found the age of the graduating seniors to be a factor relevant to whether or not they could be coerced into participating in a religious exercise. It found less likelihood of coercion among 17 and 18 year olds than would be the case among younger students.

The *Harris* majority came to the opposite conclusion, stating that "[s]tudents are as obligated to attend and participate in graduation prayers, either by bowing their heads or 'maintain[ing] respectful silence,' at Grangeville High graduation as at the high school commencement discussed in *Lee*." *Harris* at 14092 (citation omitted.)

The two school districts in *Harris* and *Jones* established almost identical policies regarding high school graduation – the students were in charge. Yet one district was found in violation of the establishment clause and one was found free of a transgression. The same fact situation was deemed coercive in one jurisdiction and constitutional in another. One school district was found guilty of controlling a formal religious exercise and obliging the participation of a non-willing student, while

another was found to have committed no unconstitutional action.

Moreover, the Fifth Circuit Court of Appeals is not the only member of the judiciary which has handed down an opinion contrary to *Harris*. In *Adler v. Duval County School Board*, 851 F.Supp. 446 (M.D. Fla. 1994), a district judge in the Eleventh Circuit chose to follow the rationale of *Jones v. Clear Creek*. He found no establishment clause violation where student led graduation contained non-secular material. Of course, the district court in the case at bar also adopted the reasoning in *Jones*, which caused its eventual reversal.

Finally, the Ninth Circuit panel itself was not unanimous in the *Harris* opinion. Judge Wright composed a perceptive analysis in dissent stating that "I believe that the limited role of School District No. 241 does not convey a message of state endorsement of religion. . . . " *Harris* at 14097 (Wright, J., dissenting). He asserted that where the students independently plan their commencement and the disclaimer in the commencement program reaffirms that the school District does not endorse any religious content, there is no requisite state control, and no coercive effect. *Id.* at 14099.

In light of this perplexing mixture of opinions, students and school officials are left with little guidance as to what they may or may not permit when students request or initiate non-secular graduation ceremonies. Although school officials in the Ninth and Fifth circuits have a relatively clear picture of what they can and cannot do, principals, school boards, teachers and senior class members in the jurisdictions within other circuits

are invited to anticipate how the issue will ultimately be resolved. They do not know whether they may delegate any responsibility to students in any situation where non-secular material could be raised.

The members of the Board of Trustees of Joint School District No. 241 may now anticipate an Order which may be clear in its instructions, but the Order will not satisfy those who elect the Board and the Board will still be "caught in the middle" while following an unpopular policy which could be nullified if the *Jones* decision is put in place as the law of the land.

The patrons of Petitioner Joint School District No. 241 are in disagreement. District Judge Harold Ryan's decision is now overturned by a Ninth Circuit decision wherein the members of the panel do not agree. The majority have authored a decision in direct conflict with the *Jones* Fifth Circuit decision. The conflict in learned opinions invites a decision of the United States Supreme Court in more compelling terms than any arguments of counsel for the members of a Board that is required to deal with passionately held conflicting interests. The Petitioners practical problems do not involve just an interesting philosophical debate. The various individuals who are compensated as administrators and those citizens who volunteer their time need the assistance of a more precise decision.

CONCLUSION

Rule 10 of the Supreme Court Rules states that a petition for a writ of certiorari will be granted only when there are special and important reasons to do so. Among the situations generally advocating the grant of certiorari is where two or more United States Courts of Appeals issue conflicting decisions. A careful comparison of the recent decisions of the Ninth and Fifth Circuits indicates confusion and disharmony over the interpretation of *Lee v. Weisman* and the issue of whether students are free to introduce any practices or speak with any religious content in high school graduation ceremonies.

The question of whether certain actions on the part of a public school district violate the Federal Constitution presents a question of great importance and of widespread application. Petitioner urges this Court to resolve this important issue which is potentially relevant to every high school student and every high school administrator and governing body of a school system in the United States.

For these compelling reasons, this Court should grant Joint School District No. 241's petition and issue a writ of certiorari.

Respectfully submitted,

James B. Lynch
Lynch, Moore, Baskin & Parker
1607 W. Jefferson
Post Office Box 739
Boise, Idaho 83701
Telephone: (208) 336-6900

Counsel of Record for Petitioners

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her three children, BEVERLY HARRIS BUTLER, and SAMUEL HARRIS,

Plaintiffs,

v.

JOINT SCHOOL DISTRICT NO. 241; BOARD OF TRUSTEES OF DISTRICT NO. 241; TRENT WOODS, Chairperson of said Board; and AL ARNZEN, Superintendent,

Defendant.

v.

CITIZENS PRESERVING AMERICA'S HERITAGE, INC., an Idaho corporation; ANTOINE JESSE HEATH; KARLA FREI; MAUREEN SLICHTER (by and through LEON SLICHTER, parent); CHAD GRAVES; GINA ENGLE; SHERRY COXEN (by and through JACK BREEN, guardian); MARIA LOWRY, by and through ROBERT LOWRY, parent); MIKE McCARLEY; and TINA LAWRENCE,

Intervenor-Defendants.

CIVIL NO. 91-0166-N-HLR

ORDER ADDRESSING MOTIONS AND GRANTING INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed May 20, 1993)

I. INTRODUCTION

On May 28, 1991, this court entered an Order Granting Motion to Abstain and Denying Preliminary Injunction. In that order, although plaintiffs' and intervenors' motions for summary judgment had been fully briefed and argued, this court deferred ruling on such motions based on an appeal pending before the United States Supreme Court in the case of *Lee v. Weisman*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S.Ct. 1305, 113 L.Ed.2d 240 (1991). *See* Order Grant. Mot. to Abstain & Den. Prelim. Inj., filed May 28, 1991, at 15. Subsequently, this case was administratively terminated. *See* Order of Administrative Termination, filed Oct. 9, 1991.

On June 24, 1992, the Supreme Court rendered its decision in *Lee v. Weisman*, 505 U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), and thereafter plaintiffs filed a motion to reopen these proceedings and conduct further discovery.

Upon reviewing the *Lee* decision, together with the briefing submitted by the parties, the court found good cause for reopening this case, for allowing further discovery, and for permitting the parties to submit supplemental briefing regarding plaintiffs' and intervenors' previous cross-motions for summary judgment. *See* Order Grant. Mot., Reopening Case, Set. Deadlines, filed Jan. 29, 1993.

Now, having carefully reviewed the supplemental briefing submitted by the parties, along with numerous

affidavits, deposition excerpts and exhibits, the court is prepared to enter its rulings.[1]

Based on the analysis to follow, the court shall deny plaintiffs' Motion for Summary Judgment, which ultimately seeks to enjoin prayer from taking place at future graduations in Joint School District No. 241 because such prayer allegedly violates the Idaho Constitution[2] as well as the United States Constitution. And, the court shall grant Intervenors' Motion for Summary Judgment on Plaintiff[s'] Complaint and on Intervenors' Counterclaim to the extent that Joint School District No. 241 shall be able to continue the practice of allowing each senior class to dictate the content and form of graduation ceremonies, including the determination as to whether some sort of "prayer," or, conversely, no prayer at all, will be part of such ceremonies.

---

[1] The court has determined that further oral argument would not significantly aid the decision-making process. Therefore, in the interest of arriving at a prompt resolution to these proceedings in advance of any upcoming graduation ceremonies which may be affected by such rulings, the court shall base its decisions on the written record together with the court's recollection of the oral arguments *previously* presented on behalf of the parties.

[2] Given the fact that important state constitutional issues have been raised, this court finds that it is appropriate for those issues to be resolved by the courts of the State of Idaho. In light of the present posture of this case, rather than certifying questions to the Idaho Supreme Court, this court will rule on the federal constitutional issues and close the case. Thereafter, should they choose to do so, the parties may pursue the state constitutional issues in a state forum.

II. ANALYSIS[3]

A. The Holding in Lee v. Weisman

In *Lee*, the Supreme Court held that Robert E. Lee, a public school principal acting in accord with the policy of his Providence, Rhode Island, school district, violated the Establishment Clause by inviting a local clergy member, Rabbi Leslie Gutterman, to deliver a nonsectarian, non-proselytizing invocation at his school's graduation ceremony.

Several passages from the *Lee* decision are particularly instructive in the case at bar. Accordingly, rather than paraphrasing the Supreme Court, this court finds it beneficial to quote directly from the *Lee* opinion.

In reaching its decision the Court specifically explained that:

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or

---

[3] Many of the factual and legal issues in this case were previously addressed in this court's Order Granting Motion to Abstain & Denying Preliminary Injunction, filed on May 28, 1991; therefore, rather than restating such information, the court hereby incorporates by reference the text of its previous order. Accordingly, the focus of the analysis in this order shall be on the Supreme Court's holding in *Lee v. Weisman* and the supplemental arguments made by the parties.

> tends to do so. . . . The State's involvement in the school prayers challenged today violates these central principles.
>
> That involvement is as troubling as it is undenied. *A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State,* and from a constitutional perspective it is as if a state statute decreed that the prayers must occur.
>
> . . . .
>
> [And,] [t]he State's role did not end with the decision to include a prayer and with the choice of clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. *Through these means the principal directed and controlled the content of the prayer.*

Id., 120 L.Ed.2d at 480-81 (citations omitted) (emphasis added).

Throughout its decision the Court placed great emphasis on the particular facts before it and stated that:

> *These dominant facts mark and control the confines of our decision*: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools.
>
> . . . .
>
> [T]he policy of the city of Providence is an unconstitutional one. . . . *The government involvement with religious activity in this case is pervasive,*

> to the point of creating a state-sponsored and state-directed religious exercise in a public school.

Id. at 480 (emphasis added).

Moreover, as the Court took into account the particular facts in *Lee*, declaring that "[o]ur Establishment Clause jurisprudence remains a *delicate and fact-sensitive one*," *id.* at 487 (emphasis added), the Court acknowledged that:

> At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students. . . . In this atmosphere *the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise* in which the student was left with no alternative but to submit.

Id. at 487 (citation omitted) (emphasis added).

This court previously deferred ruling on the parties' cross-motions for summary judgment hoping that the Supreme Court would provide a definitive ruling in *Lee* which would dispose of the issues raised in these motions. Unfortunately, however, as the excerpts set forth above make clear, the Court's decision was deeply rooted in the particular facts present in the Rhode Island school district.

Thus, although *Lee* provides *some* guidance and certainly endorses the separation of church and state, it does little to resolve the dispute between the parties in the case at bar. On the contrary, as the supplemental briefing of the parties demonstrates, each side maintains that the

holding in *Lee* strengthens their respective positions. With these points in mind, the court will now turn to the supplemental arguments of the parties.

B. The Parties' Arguments in the Wake of Lee v. Weisman

Plaintiffs challenge the fact that over the years high school graduation programs in School District 241 have included invocations and benedictions, and they request this court to enjoin that practice from continuing. In their supplemental briefing plaintiffs rely primarily on *Lee*, and the Ninth Circuit decision of *Collins v. Chandler Unified School District*, 644 F.2d 759, 762 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981), which held that faculty supervision of religious activities, including voluntary prayer at public school assemblies, creates excessive entanglement of government and religion.

Plaintiffs attach much significance to the fact that graduation activities in District 241 are supervised by faculty and administrators and that the ceremony is "presided over by the principal and school board members who sit upon a raised stage above the graduates and announce them as graduates between prayers." Pls.' Supplemental Mem. Supp. Inj. & Summ. J., filed Apr. 9, 1993, at 8. Essentially, plaintiffs urge this court to find that such supervision constitutes state involvement equal to, if not greater than, that present in *Lee*, and, therefore, that the

Establishment Clause is being violated whenever prayer is incorporated into commencement exercises.[4]

Plaintiffs also argue that even though the record reflects that senior students vote on whether or not to include any prayer in their graduation programs, that such a vote is not meaningful because there is a long standing tradition of having invocations and benedictions as part of graduation ceremonies in District 241. And, plaintiffs maintain that even a vote of the students violates the Establishment Clause because no minority of students should ever have to be subjected to even the possibility of having prayer included in their public high school graduation ceremonies. Moreover, plaintiffs seem to argue that because students are aware of faculty and administrators who favor prayer as part of commencement exercises, they feel pressure to vote for the inclusion of prayer even if they do not personally want it.

On the other hand, defendants/intervenors[5] contend that the holding in *Lee* supports their position that School

---

[4] The supervision present in District 241 is certainly not atypical. As discussed above, the Court in *Lee* fully acknowledged the "high degree of control" which teachers and principals "must and do retain" at high school graduation ceremonies. Had the court wanted to do so, it could have indicated that since such supervision is always present, any prayer included in a graduation ceremony violates the Establishment Clause because supervision alone is equivalent to state involvement. To date, however, the Supreme Court has not chosen to reach that conclusion.

[5] Since defendants and intervenors make similar arguments in this proceeding, where appropriate, the court will refer to these parties collectively as "defendants/intervenors."

District No. 241 is not engaging in any practice which violates the Constitution. Defendants/intervenors distinguish the facts in this case from those present in *Lee*. Specifically, intervenors maintain that:

> [T]he factual situation here – explicit neutrality by the district, with student control of the event – is very unlike that in *Lee v. Weisman*, in which the school principal determined that prayer would occur, who would voice it, and in general what its contents would be.

In this case none of those things occurred. Intervenor's Supplemental Br. Supp. Mot. Summ. J., filed Apr. 8, 1993, at 3.

The school district defendants stress that in this case it is the senior students themselves, not the principal, who determine every element of their graduations, including whether or not prayer will be part of the ceremony, and, if so, who will say it.[6] Specifically, defendants state that:

> Although each and every element of high school graduation may not be "voted on" by the senior class, if the students chose to change traditions or change the way in which the graduation ceremony occurs, the students would have the right and authority to do so. For example, the students could decide that no music be played, that the national anthem not be played, that there

---

[6] For instance, in 1993, seniors from at least one of the three high schools in District 241 voted to have a moment of silence at the beginning of commencement, without any prayers. Def. Joint School District's Statement of Facts, filed Apr. 23, 1993, ¶ 9 at 4.

> not be a printed program, that there not be a speaker, or the students could decide to completely change the sequence of graduation and who presents diplomas. The fact that the students may not in a given year vote on each and every procedure does not in any way affect the senior class students' opportunity to decide these issues.

Def. Joint School District's Statement of Facts, filed Apr. 23, 1993, ¶ 6 at 3.

In November 1990, this impending legal action prompted School District Superintendent Al Arnzen to send a memorandum to all principals regarding the subject of graduation ceremonies.[7] However, defendants

---

[7] The "Subject" of the memorandum was "Invocation and Benediction at Graduation" and the text included the following:

> I just want to make sure we are all doing the same thing for Invocation and Benediction at graduation. The school board is permitting Invocation and Benediction at graduation and not requiring Invocation and Benediction at graduation. These are the guidelines I want you to follow:
>
> 1. Let the senior students vote on whether they do or don't want Invocation and Benediction at graduation.
> 2. If the answer is yes, then they should vote on whether they want a minister or a student to say the Invocation and Benediction.
> 3. If the students vote for a minister, then the students should vote on which minister they want to say the Invocation and Benediction.
> 4. If the students vote for students to say the Invocation and Benediction, you may want to have the 3rd and 4th students in GPA do this.
>
> Make everything an option and let the students vote.

insist that: "[The] memorandum did not change *existing* policy, but simply reinforced that the School District was to remain neutral and let the students have a choice about graduation. No change in this 'policy' has occurred in the last 15 years." *Id.*, ¶ 10 at 4 (emphasis added). Defendants explain further that:

> The only procedure that changed beginning in 1991 was that the students were provided written ballots because of the concern about this lawsuit. In prior years there was a straw poll or a hand poll or some kind of polling of the seniors with regard to choices and their decisions, but there was not a written record kept.

Id., ¶ 11. Also, since 1991, largely as a result of this lawsuit, the following disclaimer is included in the high school graduation programs for District 241:

> The Board of Trustees of Joint School District No. 241 neither promotes nor endorses any statements made by any person involved in the graduation ceremony. The District endorses each person's free exercise of speech and religion and any comments or statements made during the graduation ceremony should not be considered the opinions or beliefs of the District, the Board of Trustees or the Superintendent.

> We will dictate nothing to the students.
> If a student does not want to go to graduation, I would not force the issue. Give him/her diploma after the graduation exercise.

Aff. Verifying Docs. Filed Supp. of Pls.' Previously Filed Mot. Summ. J. & Req. for Inj. Relief, filed Apr. 9, 1993, attach. Defs.' Resp. to Request for Produc. No. 2, Item 4 (Arnzen Mem. dated Nov. 20, 1990).

Aff. Verifying Docs Filed in Supp. Pls.' Previously Filed Mot. Summ. J. & Req. Inj. Relief, filed Apr. 9, 1993, attach. Defs.' Resp. to Req. for Production No. 2, Item 11 (Arnzen Mem. dated May 15, 1991).

To further substantiate their positions, defendants-intervenors rely on the case of *Jones v. Clear Creek Independent School Dist.*, 977 F.2d 963 (5th Cir. 1992) (hereinafter "*Jones II*"), *petition for cert. filed*, 61 U.S.L.W. 3684 (U.S. Mar. 26, 1993) (No. 92-1564).

In an earlier decision, the Fifth Circuit Court of Appeals held that a Texas school district's resolution permitting public high school seniors to choose student volunteers to deliver nonsectarian, nonproselytizing invocations at their graduation ceremonies did not violate the Establishment Clause. *Jones v. Clear Creek*, 930 F.2d 416 (5th Cir. 1991) (hereinafter "*Jones I*"), *vacated*, 505 U.S. ___, 112 S.Ct. 3020, 120 L.Ed.2d. 892 (1992). Following appeal, the Supreme Court granted certiorari, vacated the Fifth Circuit's judgment in *Jones I*, and remanded it for further consideration in light of *Lee v. Weisman*. *Jones v. Clear Creek Indep. Sch. Dist.*, 505 U.S. ___, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992).

In *Jones II*, the Fifth Circuit held that *Lee* does not render the Texas school district's invocation policy unconstitutional, particularly since the resolution at issue does not "mandate an invocation; [but] merely permits one if the seniors so choose."[8] *Jones II*, *supra*, 977 F.2d at 968.

---

[8] Unlike the case at bar, however, the Fifth Circuit noted that the record in *Jones* did not disclose how each senior class chooses whether to include an invocation, nor how a student volunteer who delivers the speech is chosen. *Jones II*, 977 F.2d at 969.

Thus, based on the Fifth Circuit Court of Appeals' interpretation of *Lee*, intervenors argue that "student-planned, student-directed prayer, [should be permitted]. . . . [because the] Court in *Lee v. Weisman* 'repeatedly stress[ed] the government's direct and complete control over the graduation prayers there at issue.' " Intervenors' Supplemental Br., at 4 (*quoting Jones v. Clear Creek Indep. School Dist.*, [Jones II] 977 F.2d at 970.

C. Conclusion

As the Supreme Court noted in *Board of Education v. Mergens*, 496 U.S. 226 (1990):

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

Id. at 250.

Where, as here, the senior high school students in School District No. 241 are free to choose whether any prayer will or will not be included in their graduation programs, the mere fact that graduation ceremonies in District 241 are supervised by faculty and administrators does not begin to constitute the kind of state involvement present in Providence, Rhode Island.

Plaintiffs urge this court to find state entanglement and involvement rising to the level in *Lee* because the

school district engages in the practice of allowing students to vote on whether or not to include prayer in their graduation ceremonies. Based on this court's reading of *Lee*, beyond the fact that there is a district-wide policy of allowing senior high school students in District 241 to vote on the issue of graduation prayer, the record demonstrates that faculty and administrators have little or no involvement in that process.

In the area of Establishment Clause Jurisprudence, this court is clearly required to focus on the undisputed facts in this case. Accordingly, absent a demonstration of state involvement by School District No. 241 which even begins to approach the level of state involvement present in *Lee*, and despite the arguments of plaintiffs, this court is hard pressed to enjoin prayer from taking place at future graduations.

Apparently, the Supreme Court is willing to tolerate some prayer at graduation ceremonies. The Supreme Court has had two recent opportunities to ban all prayer at graduation ceremonies, but has declined to do so. First, in *Lee*, rather than emphasizing the need for fact sensitivity, the Court could have stated that *any* prayer at public high school graduation ceremonies violates the Constitution under *any* circumstances. But it did not do so. Or, the Court could have required that *separate* baccalaureate services be held in place of including invocations and/or benedictions in official graduation ceremonies. But it did not choose to do so.[9] And, secondly, in *Jones II*,

---

[9] The concurring opinion of Justice Souter suggested that religious students "may even organize a privately sponsored

supra, rather than vacating the judgment and remanding the case to the Fifth Circuit Court of Appeals, the Court could have directly addressed the appropriateness of senior students choosing whether or not to have prayer at their public high school graduations. But it did not choose to do so.[10]

Therefore, in light of the lack of any directive to the contrary, this court finds that the practice of allowing students to determine whether or not to include prayer in their graduation ceremonies does not violate the Establishment Clause of the United States Constitution.[11]

---

baccalaureate if they desire the company of likeminded students." *Lee v. Weisman*, 505 U.S. ___, 120 L.Ed.2d 467, 508 (1992) (Souter, J., concurring). However, nothing in the majority opinion required that a privately sponsored baccalaureate be held in order to pass constitutional muster.

[10] As summarized by the Fifth Circuit Court of Appeals, "The practical result of our decision, viewed in light of *Lee*, is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies." *Jones II*, 977 F.2d at 972.

Plaintiffs point out and this court fully acknowledges that it is not bound to follow or accept the Fifth Circuit's interpretation of *Lee*. Nevertheless, while that decision certainly does not control the rulings reached herein, this court does find much of the reasoning in *Jones II* to be persuasive. As noted, a petition for certiorari is currently pending in *Jones II*. Thus, the Supreme Court has *yet another opportunity* to guide the district and appellate courts of this country by defining the parameters of the Establishment Clause within the context of public high school graduation ceremonies – should it choose to do so.

[11] However, as the Fifth Circuit Court of Appeals properly pointed out, "What the Establishment Clause *finally* means in a specific case is what the [Supreme] Court says it means." *Jones II*, 977 F.2d at 966 (emphasis added).

III. ORDER

Based on the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that plaintiffs' Motion for Summary Judgment should be, and is hereby, DENIED.

IT IS FURTHER ORDERED that Intervenors' Motion for Summary Judgment on Plaintiff[s'] Complaint and on Intervenors' Counterclaim should be, and is hereby, GRANTED to the extent that Joint School District No. 241 shall be able to continue the practice of allowing each senior class to dictate the content and form of graduation ceremonies, including the determination as to whether some sort of "prayer," or, conversely, whether no prayer at all, will take place at such ceremonies.

IT IS FURTHER ORDERED that, no opposition to such motion having been filed, the Motion for Leave to File Brief Amicus Curiae in Support of Defendants, filed April 23, 1993, should be, and is hereby, SUMMARILY GRANTED; and the Clerk of Court SHALL FILE the Brief Amicus Curiae of the Student Coalition for Free Speech in Support of Defendants.[12]

DATED this 20 day of May, 1993.

/s/ Harold L. Ryan
HAROLD L. RYAN
SENIOR UNITED STATES
DISTRICT JUDGE

---

[12] Upon review of the brief submitted by the Student Coalition for Free Speech the court notes that the conclusion erroneously requests that a writ of certiorari not be granted in this case. Such a request should be addressed to the Supreme Court and is, therefore, premature.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her three children; BEVERLY HARRIS BUTLER, formerly Beverly Harris; SAMUEL HARRIS,

Plaintiffs-Appellants,

v.

JOINT SCHOOL DISTRICT No. 241; BOARD OF TRUSTEES OF DISTRICT No. 241; TRENT WOODS, Chairperson of Board; AL ARNZEN, Superintendent,

Defendants-Appellees,

v.

CITIZENS PRESERVING AMERICA'S HERITAGE, INC., an Idaho Corporation; et al.,

Defendants-Intervenors-Appellees.

No. 93-35839

D.C. No. CV-91-00166-HLR

OPINION

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted
June 6, 1994 – Seattle, Washington

Filed November 18, 1994

Before: Eugene A. Wright, Charles Wiggins and David R. Thompson, Circuit Judges.

Opinion by Judge Wiggins; Partial Concurrence and Partial Dissent by Judge Wright

---

SUMMARY

Individual Rights/Religious Freedom/Government Law

The court of appeals affirmed in part a district court judgment and reversed in part. The court held that prayers at a high school graduation ceremony violated the Establishment Clause, even though the school district allowed members of the senior class to vote on whether they wanted to have prayers at graduation.

Grangeville High School holds a yearly graduation ceremony in the school gymnasium. The school board sets the time for graduation, and the school pays the bills for the ceremony. Appellee the Joint School District No. 241 (District) allowed the high school's senior class, as a group, by majority vote, to decide whether they wanted an Invocation and Benediction at graduation. The students were also allowed to vote on who should say the Invocation and Benediction. Students who did not want to go to graduation could get their diplomas after the graduation exercise. The commencement program contained a disclaimer stating that appellee the Board of Trustees of the District neither promoted nor endorsed any statements made by people involved in the graduation ceremony.

Appellants, students and a parent of students challenged the constitutionality of the inclusion of prayer in the high school's graduation ceremony. They claimed that the prayers violated the Idaho Constitution's "Religion Clauses" and the Establishment Clause of the United States Constitution. The plaintiffs originally sued in state court, but the defendants removed the case to the district court. The district court allowed several students and parents to intervene on the side of the District. The intervenors claimed that they have a right under the Free Speech and Free Exercise Clauses of the United States Constitution to have a prayer at the graduation ceremony. The district court declined to rule on the state law issues, held that the prayers did not violate the Establishment Clause, and entered judgment for the defendants. The plaintiffs appealed.

[1] The district court exercised its discretion to dismiss the state constitutional issues, over which it had pendant or supplemental jurisdiction. [2] Whether the graduation prayers violated the Idaho Constitution was a novel and complex issue of first impression. [3] After the district court decided that no Establishment Clause violation had occurred, it dismissed all claims over which it had original jurisdiction. Thus, the district court did not abuse its discretion when it declined to consider the state constitutional law claims.

[4] In *Collins v. Chandler Unified Sch. Dist.*, the Ninth Circuit held that prayers by students at high school assemblies held on school property during school hours violated the Establishment Clause.

[5] The District claimed that the involvement of the seniors in place of the District was sufficient to shield the prayers from the reach of the Establishment Clause. [6] However, state involvement in this case was pervasive enough to offend Establishment Clause concerns. The school ultimately controlled the graduation. The seniors had authority to make decisions regarding graduation only because the school allowed them to have it. [7] In addition, the school was underwriting the event, and the graduation was attended and approved by school officials.

[8] Under *Collins*, whether school officials make the decision or give their authority to decide to another, the ultimate responsibility for those decisions is borne by school officials. In this case, *Collins* required a finding of state involvement sufficient to violate the Establishment Clause. [9] The District delegated its authority to make decisions regarding a school-sponsored, school-controlled event to the senior class. When the senior class is given plenary power over a state-sponsored, state-controlled event such as a high school graduation, it is just as constrained by the Constitution as the state would be. [10] The District's disclaimer on the commencement programs did not save the school's practice.

[11] This case did not involve an open forum, at least with respect to prayer at graduation and the rights of students in the minority, whose rights were at issue in this case. Only speakers chosen by the majority of the senior class were allowed. The message of the speakers was also chosen by the majority. The graduation forum was closed to a minority of students.

[12] The presence of state involvement and the obligatory nature of the students' participation in the religious activity taking place at graduation rendered the high school's graduation prayers unconstitutional.

[13] The District and the intervenors argued that to deny students permission to pray at graduation would violate the students' rights to free speech and free exercise of religion. However, the conclusion that the high school graduation was not an open or public forum with regard to the prayers disposed of the free speech argument. [14] *Collins* disposed of the free exercise argument.

Circuit Judge Wright concurred in part and dissented in part, stating that the limited role of the District did not convey a message of state endorsement of religion. The holding in *Collins* had to be limited to the context of school day assemblies.

COUNSEL

Stephen L. Pevar, American Civil Liberties Union, Denver, Colorado, for the plaintiffs-appellants.

James B. Lynch and Kirtlan G. Naylor, Imhoff & Lynch, Boise, Idaho, for the defendants-appellees.

Stanley D. Crow, Boise, Idaho, for the defendants-intervenors-appellees.

Jay Alan Sekulow, American Center for Law and Justice, Washington, D.C., for amicus Student Coalition for Free Speech.

Marc D. Stern, American Jewish Congress, New York, New York, for amicus American Jewish Congress, et al.

OPINION

WIGGINS, Circuit Judge:

OVERVIEW

In this case, students and a parent of students challenge the constitutionality of the inclusion of prayer in the Grangeville High School graduation ceremony held yearly in Grangeville, Idaho. The plaintiffs claim that the prayers vioalte Article IX, sections 5 and 6,[1] and Article I, section 4,[2] of the Idaho Constitution (the "Idaho Religion Clauses"), and the Establishment Clause of the United States Constitution. Plaintiffs originally sued in state court. Defendants removed the case to federal district court. The district court allowed several students and parents to intervene on the side of the school district. The intervenors claim that they have a right under the Free Speech and Free Exercise Clauses of the United States Constitution to have a prayer at the graduation ceremony. Both the plaintiffs and intervenors moved for summary judgment. The district court declined to rule on the state

---

[1] Article IX, section 5 provides in part,

> . . . Neither the legislature nor . . . any school district . . . shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose. . . .

Article IX, section 6, provides in part,

> [N]o teacher or student of any [public educational institution of the state] shall ever be required to attend or participate in any religious service whatever.

[2] Article 1, section 4 provides in part,

> No person shall be required to attend or support any- . . . religious sect . . . ; nor shall any preference be given by law to any religious denomination or mode of worship.

law issues, held that the prayers did not violate the Establishment Clause, and entered judgment for the defendants. *Harris v. Joint Sch. Dist. No. 241*, 821 F.Supp. 638, 639 n. 2, 639-44 (D.Idaho 1993). Plaintiffs appeal.

DISCUSSION

I. Idaho Constitutional Law Claims

Plaintiffs first contend that the district court erred by declining to decide whether the prayers violated the Idaho Constitution. The district court ruled as follows regarding these state law claims:

> Given the fact that important state constitutional issues have been raised, this court finds that it is appropriate for those issues to be resolved by the courts of the State of Idaho. In light of the present posture of this case, rather than certifying questions to the Idaho Supreme Court, this court will rule on the federal constitutional issues and close the case. Thereafter, should they choose to do so, the parties may pursue the state constitutional issues in a state forum.

821 F.Supp. at 639 n. 2.

[1] Though the district court's explanation is somewhat ambiguous, we conclude that the district court exercised its discretion to dismiss the state constitutional issues, over which it had pendant or supplemental jurisdiction.[3] "We review the district court's decision whether

---

[3] The district court did not abstain under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). *Pullman* abstention is an "exception[ ] to [a federal court's] duty to adjudicate

to exercise pendent jurisdiction for an abuse of discretion." *O'Connor v. Nevada*, 27 F.3d 357, 362 (9th Cir.1994);

---

controversies properly before [it]." *Richardson v. Koshiba*, 693 F.2d 911, 915 (9th Cir.1982). The *Pullman* abstention doctrine allows a "federal court [to] postpone the exercise of its jurisdiction" pending resolution of a state law issue when such resolution would moot or present in a different light a present federal constitutional issue. *Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir.1982).

"A district court abstaining under *Pullman* must dismiss the state law claim and stay its proceedings on the [federal] constitutional question until a state court has resolved the state issue." *Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 622 (9th Cir.1993); *see Manney v. Cabell*, 654 F.2d 1280, 1285 (9th Cir.1980) ("The district court should retain jurisdiction of the federal constitutional issues at the request of either party, pending proceedings in the state courts."), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982); *Santa Fe Land Improv. Co. v. City of Chula Vista*, 596 F.2d 838, 841 (9th Cir.1979) ("If the court abstains under *Pullman*, retention of jurisdiction, and not dismissal of the action, is the proper course."). "The purposes of *Pullman* abstention are said to be to avoid both unnecessary adjudication of federal questions and needless friction with state policies." *Privitera v. California Bd. of Medical Quality Assurance*, 926 F.2d 890, 895 (9th Cir.1991) (internal quotations omitted); *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir.1983). *Pullman* abstention is also intended to avoid the "premature determination of constitutional questions." *C-Y Dev. Co.*, 703 F.2d at 377 (internal quotations omitted); *accord Knudsen Corp.*, 676 F.2d at 377 ("One of the main principles served by the *Pullman* abstention doctrine is the avoidance of deciding constitutional issues.").

In this case, the district court did not postpone the exercise of its jurisdiction. Nor did the district court stay its proceedings until the state court resolved the state law issues. Rather, the district court kept jurisdiction, addressed the federal question, and decided the case. After deciding the case, the district court "closed" it, so no jurisdiction was retained by the district court

Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303, 1309 (9th Cir.1992) ("clear error of judgment"), *cert. denied*, 113 S.Ct. 1644 (1993).

Section 1367(c) of 28 U.S.C. provides that a district court " 'may decline to exercise supplemental jurisdiction over a claim' if any one of the four circumstances listed in the statute exist." *O'Connor*, 27 F.3d at 362-63 (quoting the statute). As did the court in *O'Connor*, we find that "two of those circumstances . . . exist in the present case," *id.* at 363: "the [state] claim[s] raise[d] . . . novel or complex issue[s] of State law . . . [and] the district court ha[d] dismissed all claims over which it ha[d] original jurisdiction. . . . " 28 U.S.C. § 1367(c)(1), (3); *see O'Connor*, 27 F.3d at 363.

[2] First, whether the graduation prayers violate the Idaho Constitution is a novel and complex issue of first impression. The Idaho Supreme Court has not addressed prayer in the public schools in any context. Moreover, the state constitutional provisions bear no resemblance to those found in the First Amendment and appear to be the product of Idaho's unique religious history. *Cf. Medrano v. City of Los Angeles*, 973 F.2d 1499, 1506 (9th Cir.1992) (affirming dismissal of pendent claims in part because otherwise the district court would have to "resolve difficult questions of California law" (internal quotations omitted)), *cert. denied*, 113 S. Ct. 2415 (1993).

---

pending resolution of the state law claims. The district court's acts are inconsistent with abstention doctrines and purposes. They show that the district court did not intend to abstain but instead dismissed the pendant state law claims.

[3] Second, after the district court decided that no Establishment Clause violation had occurred, it dismissed all claims over which it had original jurisdiction. "[I]n the usual case in which federal-law claims are eliminated before trial, the balance of the factors of economy, convenience, fairness, and comity will point toward declining to exercise jurisdiction over the remaining state-law claims." *O'Connor*, 27 F.3d at 363 (internal quotations and brackets omitted). For these reasons, "we conclude that the district court did not abuse its discretion in declining to consider the state constitutional law claim[s]." *Id.*

We recognize that generally a federal court "should avoid the adjudication of federal constitutional issues when alternative grounds are available, . . . even when the alternative ground is one of state constitutional law." *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042 (9th Cir.1985) (citation omitted). In this case, however, federal constitutional adjudication was necessary whether or not the state constitutional claim was present. If the district court had retained the Idaho constitutional claims and decided that the Idaho constitution was not violated, it would have had to resolve the plaintiffs' Establishment Clause claim. If the district court had decided that the prayers violated the Idaho Constitution, it would have had to decide the intervenors' Free Exercise claim. *See Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 762-63 (9th Cir.) (resolving free exercise and free speech arguments raised by a school district, after holding that the district had violated the Establishment Clause), *cert. denied*, 454 U.S. 863 (1981). As it was, the district court dismissed the state law claim and was left with only the federal claims. The district court was faced with federal

constitutional adjudication no matter how it resolved the state law issues. Therefore, the doctrine recognized in *Carreras* does not require that the district court (or this court) consider the pendent state law claim. The Establishment Clause cases relied on by the plaintiffs, *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir.1993), *cert. denied*, 114 S.Ct. 2707, (1994), and *Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir.1991), *cert. denied*, 112 S.Ct. 969, (1992), are inapposite. In neither case was a federal free exercise or free speech right asserted.

II. The Establishment Clause

A. Lee and Collins

The plaintiffs contend that the district court erred in holding that the prayers did not violate the Establishment Clause. The Supreme Court recently addressed, in *Lee v. Weisman*, 112 S.Ct. 2649 (1992), whether a prayer said at a high school graduation ceremony violated the Establishment Clause.

In *Lee*, the principal of the high school invited Rabbi Leslie Gutterman to deliver prayers at the Nathan Bishop Middle School graduation. The principal gave the Rabbi a pamphlet, prepared by an organization of Christians and Jews, recommending what kinds of prayers should be given at civic ceremonies. The principal also advised the Rabbi that the prayers should be nonsectarian. The Rabbi's prayers were nonsectarian yet squarely in line with Judeo-Christian tradition. The graduation ceremony took place on school property. Attendance was stipulated by the parties to be voluntary. Students stood while the pledge of allegiance was said and remained standing

during the prayers. The Court could not determine whether the Rabbi remained on the stage or participated in any other aspect of the graduation. Though the facts recited in the case describe only the Rabbi's prayer at the middle school, the school district's practice at the high school graduation, substantially the same as that at the middle school, was also at issue. *Id.* at 2652-54.

The Court held that the prayers violated the Establishment Clause. *Id.* at 2661. The Court reasoned,

> These dominant facts mark and control the confines of our decision: [1] State officials direct the performance of a formal religious exercise at . . . graduation ceremonies for secondary schools. [2] Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Id. at 2655. As to the first dominant fact, the Court reasoned that direction by state officials created a "potential for divisiveness" over religion. *Id.* at 2656.

As to the second dominant fact, the position of the students, the Court reasoned that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id.* at 2658. In this environment,

> [w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices . . . may appear to the nonbeliever or dissenter to be an

> attempt to employ the machinery of the State to enforce a religious orthodoxy.
>
> . . . . The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. . . . [F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is . . . real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer. That was the very point of the religious exercise. . . . What matters is that, given our social conventions, a reasonable dissenter . . . could believe that the group exercise signified her own participation or approval of it.

Id. at 2658. The Court also noted that whether attendance at high school graduation could be called "voluntary" or not was irrelevant. High school graduation is an extremely important event, important enough that "to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme." *Id.* at 2659. "It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Id.* at 2660.

This court has also addressed the practice of praying at high school assemblies. *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d at 759. In *Collins*, the Student Council requested and was granted permission by the principal to open with prayer student assemblies held on school property during school hours. The Student Council "allotted a certain amount of time on the [assembly] agenda and selected one member of the student body to say the prayer. The selected student was free to choose the manner and words in which the prayer was delivered." *Id.* at 760. Students not wishing to attend the assembly could "report to a supervised study hall." *Id.*

[4] We held that these prayers violated the Establishment Clause, citing the "three part test enunciated in *Lemon v. Kurtzman*," 403 U.S. 602 (1971). "That test establishes that a state regulation does not violate the Establishment Clause if (1) the enactment has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion." 644 F.2d at 762. Applying the *Lemon* test, we found that, first, "the invocation of assemblies with prayer has no apparent secular purpose. . . . Second, the primary effect of such prayer appears to advance religion. . . . " *Id.* (citations omitted). Third, the prayers involved excessive entanglement because "the school assemblies required surveillance by school officials and . . . probably involved attendance by faculty or administrators needing to supervise the obviously large gathering of students." *Id.*

We also held that there was "no meaningful distinction between school authorities actually organizing the

religious activity and officials merely 'permitting' students to direct the exercises." *Id.* at 761. Further, we noted that whether attendance at the assemblies could be called voluntary was irrelevant. "The . . . students must either listen to a prayer chosen by a select group of students or forego the opportunity to attend a major school function. It is difficult to conceive how this choice would not coerce a student wishing to be part of the social mainstream and, thus, advance one group's religious beliefs." *Id.* at 762.

B. Facts of this Case

We examine the facts of this case against the background of *Lee* and *Collins*. Grangeville High has had an invocation and a benediction at high school graduation since 1981 or earlier. Grangeville High's graduation is in many if not most respects like the graduation at issue in *Lee*. The fairly standard program has been repeated year after year.[4] Graduation is held in the school gymnasium. The school board sets the time for graduation. The school pays the bills for the ceremony, from public funds, including costs of the building, chairs, platform for

---

[4] Grangeville High graduation is like most other high school graduations. The high school band plays a processional. After the traditional invocation, the band plays the national anthem. An invited speaker gives a commencement address. The principal presents the graduating class. A trustee of the school board presents the diplomas. Then the band plays again, a benediction is said, and the graduating class marches out. Only slight variations in this program have occurred in the last thirteen years (i.e., the pledge of allegiance in place of the national anthem).

speakers, sound system, secretarial help, and janitorial staff.

The school district contends, however, and the district court found, that the facts in this case differ from *Lee* in a manner that makes *Lee* inapposite. The school district has taken a number of steps to distance itself from the decisions whether to have a prayer, who to select to say it, and how it is to be said. Essentially, the school district claims that the Grangeville High senior class, as a group, by majority vote, have made these decisions and otherwise planned the graduation program without interference from school officials.

> [I]n this case it is the senior students themselves, not the principal, who determine every element of their graduations, including whether or not prayer will be part of the ceremony, and, if so, who will say it.
>
> . . . .
>
> > Although each and every element of high school graduation may not be "voted on" by the senior class, if the students chose to change traditions or change the way in which the graduation ceremony occurs, the students would have the right and authority to do so. For example, the students could decide that no music be played, that the national anthem not be played, that there not be a printed program, that there not be a speaker, or the students could decide to completely change the sequence of graduation and who presents diplomas. The fact that the students may not in a given year vote on each and every procedure does not

> in any way affect the senior class students' opportunity to decide these issues.

Harris, 821 F.Supp. at 641 (quoting the school district's statement of facts).

In November 1990, School District Superintendent Al Arnzen sent a memo to all principals regarding prayer at graduation ceremonies. The memo stated:

> I just want to make sure we are all doing the same thing for Invocation and Benediction at graduation. The school board is permitting . . . and not requiring Invocation and Benediction at graduation. These are the guidelines I want you to follow:
>
> 1. Let the senior students vote on whether they do or don't want Invocation and Benediction at graduation.
>
> 2. If the answer is yes, then they should vote on whether they want a minister or a student to say the Invocation and Benediction.
>
> 3. If the students vote for a minister, then the students should vote on which minister they want to say the Invocation and Benediction.
>
> 4. If the students vote for students to say the Invocation and Benediction, you may want to have the 3rd and 4th students in GPA do this. Make everything an option and let the students vote. We will dictate nothing to the students. If a student does not want to go to graduation, I would not force the issue. Give him/her the diploma after the graduation exercise.

Id. at 641-42 n. 7. The memo "did not change existing policy, but simply reinforced" prior practice. *Id.* at 642

(internal quotations omitted). However, from 1991 forward, students were given written ballots for the prayer poll, whereas before a hand vote was taken.

Also, since 1991, the following disclaimer has appeared in the commencement programs:

> The Board of Trustees of Joint School District No. 241 neither promotes nor endorses any statements made by any person involved in the graduation ceremony. The District endorses each person's free exercise of speech and religion and any comments or statements made during the graduation ceremony should not be considered the opinions or beliefs of the District, the Board of Trustees or the Superintendent.

Id. On the basis of these facts, the district court concluded that there was "little or no [state] involvement" in the process resulting in prayer. *Id.* at 643.

To the facts relied on by the district court, defendants add the following: The students' freedom to plan the program is illustrated by the fact that in 1990 the benediction consisted of a musical number by two graduating students. In 1992, Grangeville again had a musical benediction. In 1993, Clearwater Valley High, also in District No. 241, had a moment of silence, without prayers. While Grangeville High principal Judy Leuck has in the past asked students who participate in commencement, including those who pray, to write down what they will say, no school official reviews presentations prior to commencement. No one is asked to participate in the prayer by standing, bowing their heads, or removing their hats. The prayer is not included in commencement rehearsal.

The district also notes that seniors can choose whether or not to have the commencement. If the class goes ahead with commencement, senior class officers have the responsibility to contact individuals participating. The senior class pays for the printed commencement program from funds it has raised and from student activity fees it receives from the school. The district does not consider the commencement to be part of its educational program. Beyond these facts, the intervenors stress that seniors make all decisions relating to the ceremony. In fact, Superintendent Arnzen agreed with the statement that "[t]he principal doesn't have the power to decide that there will be no prayer at graduation."

The plaintiffs wish us to consider other facts: Some students voted not to have prayer at graduation. Seniors have never voted on some aspects of graduation. For instance, that the school band play the processional has never been questioned. Rather, the school principal and band director have arranged that in order to involve students in the graduation ceremony. The prayers that were given were Christian prayers. Some school board members made statements to the press in support of graduation prayers. Principal Leuck agreed that, under present school policy, school officials would not interfere with a graduation planned by the senior class even if the students voted to "have the whole thing be a religious service."

C. Analysis

1. *Lee* and *Collins* Applied

[5] The Court in *Lee* noted two facts that marked and controlled its decision: (1) state involvement and (2)

the obligatory nature of the students' participation in the religious activity taking place at graduation. The district argues that the first controlling fact of the *Lee* decision, state involvement, is absent in this case. The district claims that the involvement of the seniors in place of the school district is sufficient to distinguish *Lee* and shield the prayers from the reach of the Establishment Clause.

In support, the district cites *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir.1992), *cert. denied*, 113 S.Ct. 2950 (1993). *Jones* addressed a school district policy similar to that involved in this case. The school district gave discretion to the senior class to choose whether they would have prayers at graduation. *Id.* at 964, 964 n. 1. The *Jones* court concluded that, because the school district had engaged in no acts of state control similar to those present in *Lee*, the Establishment Clause did not prohibit the prayers. *Id.* at 970-71. The *Jones* court further concluded that, because the students themselves participated in the decision as to whether prayers should be said, there was less coercive effect on the students who attended graduation. *Id.* at 971- 72. *Jones* also held that the school district's determination to delegate the decision to the seniors, with prayers resulting, passed the *Lemon* test. *Id.* at 966-69.

We are not persuaded by the reasoning in *Jones*. In this case, we find present both of the factors relied on by the Court in *Lee*.

a. State Involvement

[6] For several reasons, we find state involvement in this case pervasive enough to offend Establishment Clause concerns. First, the school ultimately controls the event. "At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students." *Lee,* 112 S.Ct. at 2660; *see also Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986). Significantly, all of the parties in this case agree that the seniors have authority to make decisions regarding graduation only because the school allows them to have it. No party has argued that high school seniors, as a class, have an exclusive right to direct their high school graduation by majority vote. To the contrary, the parties appear to agree, as we do, with what Superintendent Arnzen said was a fair characterization of graduation: "[T]he graduation ceremony is the presentation *by the school* of diplomas representing graduation certificates to the people who have fulfilled the requirements of the high school for graduation." (Emphasis supplied.)

[7] Second, the school underwrites the event. The school offers to the senior class, at no cost, the building and other expenses. Even the commencement programs are paid for in part with money the senior class is allotted from student registration funds. The graduation is attended and approved of by school officials. School officials encourage the senior class officers to prepare graduation and give them some control over the program in order to encourage leadership.

Given that graduation is ultimately a school-controlled, school-sponsored event, there appears in this case to be just as much state involvement as appeared in *Collins*. As in *Collins*, the assembly in this case occurs on school property at a time scheduled and set aside by school officials.[5] With respect to state involvement, there is little if anything to distinguish the Grangeville High graduation ceremony from the school assemblies at issue in *Collins*.

[8] We held in *Collins* that the fact that students set the assembly agenda and make decisions as to whether a prayer shall occur, who shall say it, and how it shall be said is insufficient to distance school officials from what would otherwise be an Establishment Clause violation. We found "no meaningful distinction" between school officials acting directly and school officials "merely permitting students to direct the exercises." 644 F.2d at 761 (internal quotations omitted). Under *Collins*, therefore, whether school officials make the decisions or give their authority to decide to another, the ultimate responsibility for those decisions is borne by school officials. Applied in this case, *Collins* requires us to find state involvement sufficient to violate the Establishment Clause.

That school officials cannot divest themselves of constitutional responsibility by allowing the students to make crucial decisions should not be surprising. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to

---

[5] That school officials establish the time of graduation renders irrelevant the fact that graduation does not take place during normal school hours.

place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Board of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Because state and federal governments are republican in nature, the Constitution usually acts to limit the power of representatives. The Constitution's reach is not limited only to the acts of representatives, however. Elected officials cannot avoid constitutional mandates by putting them to a majority vote. "One's . . . fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id.* "The notion that a person's constitutional rights may be subject to a majority vote is . . . anathema." *Gearon v. Loudoun County. Sch. Bd.*, 844 F.Supp. 1097, 1100 (E.D.Va.1993). Giving majorities the power of the state without constitutional restrictions undermines the limitations on majority oppression the Constitution establishes. It also in this case would inject into our public schools the divisiveness regarding religion against which the *Lee* decision intended to guard. 112 S.Ct. at 2656.

Furthermore, elected officials cannot absolve themselves of a constitutional duty by delegating their responsibilities to a nongovernmental entity. Even private citizens when acting with government authority must exercise that authority constitutionally. *Cf. Evans v. Newton*, 382 U.S. 296. 299 (1966) (stating that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action," and listing examples); *Griffin v. Maryland*, 378 U.S. 130, 135 (1964) (holding an amusement park employee had

engaged in state action); *Terry v. Adams*, 345 U.S. 461 (1953) (holding a private political society was sufficiently involved in the local electoral process to warrant oversight by the judiciary lest the society deprive other voters of their constitutional rights).

[9] In *Collins*, the school delegated its authority to make decisions regarding school-sponsored, school-controlled assemblies to the Student Council. In this case, the school district has delegated its authority to make decisions regarding a school-sponsored, school-controlled event to the Grangeville High senior class. *Lee* holds that school officials cannot do what the senior class has done in this case. We cannot allow the school district's delegate to make decisions that the school district cannot make. When the senior class is given plenary power over a state-sponsored, state-controlled event such as high school graduation, it is just as constrained by the Constitution as the state would be.

Indeed, a decision to the contrary would allow school boards in religious communities generally to avoid Establishment Clause concerns in the public schools. The school board could allow students to vote daily prayers and the Ten Commandments back into their classrooms. *See Engle v. Vitale*, 370 U.S. 421 (1962) (daily prayers); *Stone v. Graham*, 449 U.S. 39 (1980) (the Ten Commandments). "While in some societies the wishes of the majority might prevail, the Establishment Clause" requires us to reject that path. *Lee*, 112 S.Ct. at 2660. In short, we are "not persuaded that the responsibility of the School Board may be treated so lightly as the School Board insists." *Collins*, 644 F.2d at 762 (internal quotations omitted).

[10] The school district's disclaimer on the commencement programs does not save the school's practice. The student in the religious minority is well aware that the school has delegated authority over the prayers to the majority of her classmates while retaining ultimate control over the school-sponsored meeting. The student is also aware that the effect of the delegation is that her religious views are subordinated to the majority's. While the district asserts that it "neither promotes nor endorses" the stated views, this disclaimer flies in the face of what the student knows is occurring.

Cases cited by the school district are not to the contrary. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S.Ct. 2462 (1993), addressed whether the state could provide a publicly-paid interpreter to a deaf student whose parents had chosen to place him in a private parochial school. The Court held that the Establishment Clause was not offended, in part because the statute providing a publicly paid interpreter accorded parents the right to select a school. Thus, the presence of the interpreter in the parochial school was solely the result of private choice, not "state decisionmaking." 113 S.Ct. at 2467. *Zobrest* involved a neutrally distributed benefit, however, the right to an interpreter. In this case, the privilege to choose whether a prayer will be said at graduation is not a neutrally distributed benefit. Each student is not allowed to have the graduation she wants. Instead, the decision is made by a majority of the senior class and imposed on a minority. Moreover, the majority-designated speaker who prays at graduation teaches religion, unlike the interpreter in *Zobrest* who neutrally passes on the messages given by others. *See* 113 S.Ct. at 2469.

Nor is *Collins* undercut, as the school district suggests, by *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S.Ct. 2141 (1993), *Board of Educ. v. Mergens*, 496 U.S. 226 (1990), or *Garnett v. Renton Sch. Dist. No. 403*, 987 F.2d 641 (9th Cir.), *cert. denied*, 114 S.Ct. 72 (1993). Specifically, the school district contends that its high school graduation is an open forum in which student speech is allowed on a nondiscriminatory basis such that the Establishment Clause is not offended. The school district contends Justice O'Connor's opinion in *Mergens* is most apposite:

> "[A]n open-forum policy, including nondiscrimination against religious speech, would have a secular purpose" . . . [Such a forum] does not "confer any imprimatur of state approval on religious sects or practices." Indeed, the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.

496 U.S. at 248 (opinion of O'Connor, J., for herself and three other Justices) (quoting *Widmar v. Vincent*, 454 U.S. 263, 271, 274 (1981)) (citations omitted). All of these cases involved the use of school property as a "public" or "open" forum of some sort, in which school officials allowed on a nondiscriminatory basis various non-school-related meetings to be held on school property when the property was not being used for school purposes. *Lamb's Chapel* and *Mergens* held that if school officials create such a forum they cannot decline to allow religious meetings to be held under similar circumstances solely because those meetings involve religion. *Lamb's Chapel*, 113 S.Ct. at 2146-49; *Mergens*, 496 U.S. at 243-47; 496 U.S. at 248

(opinion of O'Connor, J.); *see Widmar v. Vincent*, 454 U.S. at 271, 274. *Garnett* held that the Equal Access Act, 20 U.S.C. §§ 4071-74, on which *Mergens* partly relies, overrides state constitutional law contrary to it. 987 F.2d at 644-46. In all of these cases, attendance at all religious as well as non-religious meetings was entirely voluntary, no religious meeting was sponsored by the school, and school officials neither encouraged nor participated in the meetings except on a custodial basis. *E.g., Lamb's Chapel*, 113 S.Ct. at 2143-48; *Mergens*, 496 U.S. at 231-47.

[11] Contrary to the suggestion of the district, this case does not involve an open forum, at least with respect to prayer at graduation and the rights of students in the minority, whose rights are at issue in this case, *see Lee*, 112 S.Ct. at 2658. Only speakers chosen by the majority of the senior class are allowed. The message of the speakers is also chosen by the majority; the relevant speakers are instructed to pray. No matter what message a minority of students may wish to convey, the graduation forum is closed to them. A forum that allows only selected speakers to convey an established message and forecloses a significant portion of its members from any speech at all is not open in the required sense. *See Brody v. Spang*, 957 F.2d 1108, 1117-20 (3d Cir.1992). "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). *Lamb's Chapel, Mergens*, and *Garnett* are therefore inapposite. Moreover, in this case, attendance is not entirely voluntary, the graduation is sponsored by the

school, and school officials participate heavily in the production and presentation of commencement.

Collins therefore remains valid law and (with *Lee*) controls this case as regards whether state involvement was present. As implied by this discussion, we find the reasoning of *Jones* and cases following it[6] flawed. In any event, *Collins* requires us to reject *Jones's* reasoning. *Collins* demonstrates that the decision of school officials to hold a prayer is not the only sort of state involvement precluded by the Establishment Clause.

b. Coercion

[12] Once the requisite state involvement is shown, the rest of this case is indistinguishable from *Lee*. Students are as obligated to attend and participate in graduation prayers, either by bowing their heads or "maintain [ing] respectful silence," *Lee*, 112 S.Ct. at 2658, at Grangeville High graduation as at the high school commencement discussed in *Lee*. *Collins* is also instructive: "[S]tudents must either listen to a prayer chosen by a select group of students or forego the opportunity to attend" not just a school assembly but their own graduation. *See Collins*, 644 F.2d at 762. "It is difficult to conceive how this choice would not coerce a student wishing to be part of the social mainstream. . . . " *Id.* The presence of state involvement and the obligatory nature of the students' participation in the religious activity taking place

---

[6] *E.g., Adler v. Duval County Sch. Bd.*, 851 F.Supp. 446 (M.D.Fla.1994).

at graduation render the Grangeville High graduation prayers unconstitutional.[7]

2. *Lemon* Applied

Analysis under the *Lemon* test, reviewed in *Collins*, leads to a similar conclusion. Under the *Lemon* test, we examine whether the state action has a secular purpose, has a primary effect of advancing or inhibiting religion, or fosters excessive entanglement with religion. *Collins*, 644 F.2d at 762.

---

[7] The district court reasoned that the Supreme Court could have "ban [ned] all prayer at graduation ceremonies" but has not done so. 821 F.Supp. at 643. In support, the district court noted that the Supreme Court considered *Lee* a fact-intensive decision. 112 S.Ct. at 2661. The district court also noted that *Jones* was decided after the Supreme Court had vacated and remanded for consideration in light of *Lee* an earlier *Jones* decision reaching the same result as did the *Jones* decision on which the school district relies. *See Jones v. Clear Creek Indep. Sch. Dist.*, 112 S.Ct. 3020 (1992) (remanding *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir.1991) (*Jones I*), for reconsideration in light of *Lee*). We think neither the fact-intensiveness of *Lee* nor the vacation and remand of *Jones I* supports the notion that the Supreme Court would tolerate the prayer in this case. *Lee* was fact-intensive because Establishment Clause "jurisprudence . . . is of necessity one of line-drawing." 112 S.Ct. at 2661. Balancing interests and discerning purposes requires a "willingness to distinguish between real threat and mere shadow." *Id.* (internal quotations omitted). As to *Jones*, the district court was merely speculating. We do not know why the Supreme Court took no further action with regard to *Jones I*, 930 F.2d at 416. The district court's reliance on a denial of certiorari of the second *Jones* decision, *see* 113 S.Ct. at 2950 (denying certiorari to review *Jones*, 977 F.2d at 963), involves the same sort of speculation. *See* 821 F.Supp. at 643 n. 10.

"A government practice . . . fails the purpose prong of *Lemon* if its purpose is to endorse a religious custom or viewpoint." *Kreisner v. City of San Diego*, 1 F.3d 775, 781 (9th Cir.1993), *cert. denied*, 114 S.Ct. 690 (1994). *Collins* held that "the invocation of assemblies with prayer has no apparent secular purpose. . . ." *Collins*, 644 F.2d at 762. The graduation assembly or ceremony at issue here presents no circumstances that would distinguish it from *Collins*. The school district suggests that the prayer is intended to solemnize the occasion. However, we find solemnization through prayer no more secular than the use of prayer in "the promotion of moral values, the contradiction to the materialistic trends of our times, [and] the perpetuation of our institutions. . . ." *Abington School Dist. v. Schempp*, 374 U.S. 203, 223 (1963). Prayer and reading of the Bible without comment in public schools were alleged to serve such purposes in *Abington*, yet these goals were insufficient to save those practices under the Establishment Clause. 374 U.S. at 223-24. Nor was the teaching of legal history sufficient to save the practice of displaying the Ten Commandments on the high school wall in *Stone v. Graham*, 449 U.S. at 39-40 n. 1, 41-42. Prayer is probably the "quintessential religious practice." *Jaffree v. Wallace*, 705 F.2d 1526, 1534 (11th Cir.1983), *aff'd*, 472 U.S. 38 (1985). We conclude that solemnization is insufficient in this case to secularize what is objectively and inherently religious.

Even if the prayers did have a secular purpose, "the primary effect of such prayer appears to advance religion. . . ." *Collins*, 644 F.2d at 762. The prayers said in this case are indistinguishable from those that might be said in a church service. If said there, no one would dispute

that their intent and primary effect was to advance religion. We do not think the character of the prayers changes when said at graduation. For the foregoing reasons, we conclude that application of the *Lemon* test demonstrates an Establishment Clause violation in this case.

III. Free Speech and Free Exercise

[13] Like the school district in *Collins*, the district here and the intervenors argue that to deny students permission to pray at graduation would violate the students' rights to free speech and free exercise of religion. *See Collins*, 644 F.2d at 762-63. Essentially, the district and intervenors argue that, by giving the senior class authority to control events at graduation, the government has created an "open forum" at which, under the First Amendment, the government may not limit the speech that occurs. In support, they cite *Mergens*, 496 U.S. at 248 (opinion of O'Connor, J., for herself and three other Justices) (quoting *Widmar v. Vincent*, 454 U.S. at 271, 274); *Kreisner*, 1 F.3d at 775 (holding that the city could not constitutionally exclude from a city park a creche displayed at Christmas by a private group); *Jaffe v. Alexis*, 659 F.2d 1018, 1020 (9th Cir.1981) (holding that the California Department of Motor Vehicles (DMV) could not constitutionally prohibit Krishnas from disseminating tracts and soliciting funds on DMV property that the DMV had "made generally available to the public for speech activities"); and *Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir.1993) (holding that a school could not prohibit or restrict students' dissemination of religious literature more than other literature). As discussed above, in *Mergens* various kinds of

non-school-related speech were allowed on a non-discriminatory basis. See 496 U.S. at 243-47. The same was true in *Widmar*, 454 U.S. at 267, 274, *Kreisner*, 1 F.3d at 778, and *Jaffe*, 659 F.2d at 1020. Moreover, the city park at issue in *Kreisner* was a traditional open forum. 1 F.3d at 783. Our conclusion that the Grangeville High graduation is not an open or public forum with regard to the prayers disposes of this free speech argument.

[14] *Collins* disposes of the free exercise argument. "[T]hese high school students are free to worship together as they please before and after the school day," *Collins*, 644 F.2d at 763 (internal quotations omitted), and outside of the graduation ceremony. Moreover, by entering the public sphere and planning a state-controlled, state-sponsored meeting, the students entered the domain of the Establishment Clause. "When the explicit Establishment Clause proscription against prayer in the public schools is considered the protections of political and religious speech are inapposite." 644 F.2d at 763 (internal quotations omitted).[8]

Contrary to the suggestion of the district and the arguments of the intervenors, the district court will have little if any difficulty fashioning an enforceable remedy in this case. Nor will the school district have difficulty outlining what may take place at graduation. Just as the

---

[8] The intervenors also allege that disallowing seniors to pray at graduation denies them equal protection of the laws. We are unpersuaded. Prayer at graduation as the intervenors envision it violates the Establishment Clause. Denial of an opportunity to violate the Establishment Clause denies to the intervenors no equal protection right.

school district gave permission to the senior class to plan graduation in part, it may take back its permission in part. The school purportedly gave seniors this chance to plan graduation in order to teach them leadership. If so, then it can teach them the responsibilities that go with such leadership, one of which is to respect the constitutional rights of others.

CONCLUSION

For the foregoing reasons, the decision of the district court is AFFIRMED in part and REVERSED in part.

WRIGHT, Circuit Judge, concurring in Part I and dissenting from Parts II and III.

This is not a prayer case involving classrooms or school assemblies. Nor does it concern the selection by a high school principal of a clergyman to provide a graduation prayer. Rather, the issue is whether a school district in a rural Idaho community may delegate to graduating students the planning and execution of their commencement, including the decision to offer an invocation and a benediction.

Because I believe that the limited role of School District No. 241 does not convey a message of state endorsement of religion, I respectfully dissent from that portion of the majority opinion finding an Establishment Clause violation. Without such a violation, there is also no need for the majority to address the free speech and free exercise issues. I do agree that the district court properly declined to decide the state law claims.

In disposing of the merits, this court should follow the lead of the Fifth Circuit in *Jones v. Clear Creek Independent Sch. Dist.*, 977 F.2d 963 (5th Cir.1992), *cert. denied*, 113 S.Ct. 2950 (1993), and the test spelled out by the Supreme Court in *Lee v. Weisman*, 112 S.Ct. 2649 (1992). Both provide better guidance than our opinion in *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981).

In *Collins* we held that student-sponsored prayer at school assemblies violates the Establishment Clause. *Id.* at 762. We explained that classroom prayer cases such as *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963), and *Engel v. Vitale*, 370 U.S. 421 (1962), supported "no meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting' students to direct the exercises." *Collins*, 644 F.2d at 761.

But our holding in *Collins* must be limited to the context of school day assemblies. That students rather than officials made the decision could not have made a difference because the assembly prayers, like those invalidated in *Abington* and *Engel*, were held in an intrinsically coercive environment. All were conducted regularly on school grounds during time allocated for curricular activities when school attendance was legally mandated. *See Abington*, 374 U.S. at 223; *Engel*, 370 U.S. at 422; *Collins*, 644 F.2d at 760-61.

We must instead look to the test articulated by the Supreme Court in *Lee*, 112 S.Ct. at 2657-61, to measure the

constitutionality of commencement prayer.[1] The Court held in *Lee* that a school violates the Establishment Clause when it exercises a high degree of control over graduation prayer, which in conjunction with the compelled nature of attendance, creates an unacceptable risk that students will be coerced to participate. *Id.* The school principal in that case decreed that an invocation and a benediction would be offered, chose the religious participant and prescribed the content. *Id.* at 2655-56. The Court emphasized that Establishment Clause analysis is "delicate and fact-sensitive," *id.* at 2661, and carefully limited its holding to the circumstances of the case. *Id.* at 2655.

The majority finds the necessary degree of control because School District No. 241 retains ultimate authority over commencement, and sponsors the event by underwriting the costs.[2] It reasons that "school officials cannot divest themselves of constitutional responsibility by allowing the students to make crucial decisions." *See* majority opinion, *supra* at 18-21. This analysis, however, does not answer the underlying question examined in *Lee*: Does the School District's involvement in the decision to have and the presentation of an invocation and a

---

[1] In contrast to school assemblies, commencement comes annually outside of the regular curriculum. It is a community event held not for the entire student body, but for maturing seniors.

[2] The Supreme Court has clarified that custodial oversight "does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities." *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 253 (1990).

benediction make it clear that the prayer bears the imprint of the state? 112 S.Ct. at 2657.[3]

The answer is no. As the district court concluded, "the record demonstrates that faculty and administrators have little or no involvement in that process." *Harris v. Joint Sch. Dist. No. 241*, 821 F.Supp. 638, 643 (D.Idaho 1993). The seniors independently plan their commencement, and decide whether to offer an invocation and a benediction. *See* majority opinion, *supra* at 13-17. The disclaimer in the commencement program reaffirms that the School District does not endorse any religious content. *See* majority opinion, *supra* at 16. Absent the requisite state control there is no coercive effect. Student-sponsored and initiated graduation prayer "place[s] less psychological pressure on students than the prayers at issue in *Lee* because all students, *after having participated in the decision of whether prayers will be given*, are aware that any prayers represent the will of their peers." *Jones*, 977 F.2d at 971.[4]

The School District merely accommodates the students' decision. Accommodation of and incidental benefits to religion do not violate the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 681-83 (1984). Accommodation does not endorse religious belief over disbelief,

---

[3] For a full summary of the elements of control relied on in *Lee* see *Jones*, 977 F.2d at 970.

[4] I also agree with the Fifth Circuit that student initiated and presented prayer at commencement satisfies the Lemon test. *See Jones*, 977 F.2d at 966-68; *see also Adler v. Duval County Sch. Board*, 851 F.Supp. 446, 451-455 (M.D.Fla.1994).

but rather shows respect for the fundamental values of others. *Lee*, 112 S.Ct. at 2676-77 (Souter, J., concurring).

And this accommodation in particular does not threaten to advance religion. Invocation and benediction have historically been integral and accepted elements of high school and college graduation ceremonies in this country. They have been part of a broader tradition of opening public ceremonies with prayer. Such formalities "serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693 (1984) (O'Connor, J., concurring).

Presidents have regularly offered prayers in inaugural addresses.[5] School days begin with the Pledge of Allegiance and its reference to "one nation under God." The constitutionally valid practice of convening Congress

---

[5] President Bush in his inaugural address said:

> And my first act as President is a prayer. I ask you to bow your heads:
>
> Heavenly Father, we bow our heads and thank You for Your love. Accept our thanks for the peace that yields this day and the shared faith that makes its continuance likely. Make us strong to do Your work, willing to heed and hear Your will, and write on our hearts these words: "Use power to help people." For we are given power not to advance our own purposes, nor to make a great show in the world, nor a name. There is but one just use of power, and it is to serve people. Help us to remember it, Lord. Amen.

Inaugural Addresses of the Presidents of the United States 346 (1989).

with prayer dates back over two centuries to the year the Senate and House of Representatives reached final agreement on the language of the Bill of Rights. *Marsh v. Chambers*, 463 U.S. 783, 788 (1983). The new graduates in School District 241 deserve to so dignify their commencement. I would affirm.

APPENDIX C

Merritt E. JONES, on his behalf and as next friend of Pamela Jones, a child, et al., Plaintiffs-Appellants,

v.

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT, Defendant-Appellee.

No. 89-2638.

United States Court of Appeals,
Fifth Circuit.

Nov. 24, 1992.

Rehearing and Rehearing En Banc
Denied Dec. 28, 1992.

Graduating seniors and parents brought suit to enjoin school district from permitting invocations and benedictions at public high school graduation ceremonies. The United States District Court for the Southern District of Texas, James DeAnda, Chief Judge, rendered judgment for school district, and appeal was taken. The Court of Appeals, 930 F.2d 416, affirmed. The students and parents petitioned for writ of certiorari. The United States Supreme Court, 112 S.Ct. 3020, granted the petition, vacated the judgment and remanded. On remand, the Court of Appeals, Reavley, Circuit Judge, held that: (1) primary effect of resolution was secular; (2) resolution's proscription of sectarianism did not in itself excessively entangle government with religion; (3) resolution was not an unconstitutional endorsement of religion by the government, as it merely permitted nonsectarian, nonproselytizing invocation if the seniors chose to have

one; and (4) resolution did not unconstitutionally coerce participation of objectors in a government-directed formal religious exercise.

Affirmed.

Bruce V. Griffiths, MacNaughton, Burdzinski, Toureno & Yow, Bellaire, Tex., Joseph A. Saranello, Mitchell A. Seider, Houston, Tex., for plaintiffs-appellants.

David M. Feldman, Vinson & Elkins, James D. Robinson, M. Karinne McCullough, Giessel, Stone, Barker & Lymay, Houston, Tex., for defendant-appellee.

David M. Feldman, Myra C. Schexnayder, Vinson & Elkins, Kelly Frels, John David Thompson, Janet L. Horton, Bracewell & Patterson, Houston, Tex., for amicus.

Appeal from the United States District Court for the Southern District of Texas.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before REAVLEY, GARWOOD and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:

In *Jones v. Clear Creek Independent School Dist.*, 930 F.2d 416 (5th Cir.1991) *(Jones I), vacated*, 505 U.S. ___, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992), we held that Clear

Creek Independent School District's Resolution[1] permitting public high school seniors to choose student volunteers to deliver nonsectarian, nonproselytizing invocations at their graduation ceremonies does not violate the Constitution's Establishment Clause. In applying the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), we reasoned that the Resolution has a secular purpose of solemnization, that the Resolution's primary effect is to impress upon graduation attendees the profound social significance of the occasion rather than advance or endorse religion, and that Clear Creek does not excessively entangle itself with religion by proscribing sectarianism and proselytization without prescribing any form of invocation. *Jones I*, 930 F.2d at 419-23.

Then, in *Lee v. Weisman*, 505 U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), the Supreme Court held that Robert E. Lee, a public-school principal acting in accord with the policy of his Providence, Rhode Island school district, violated the Establishment Clause by inviting a local clergy member, Rabbi Leslie Gutterman, to deliver a nonsectarian, nonproselytizing invocation at his school's

---

[1] The Resolution provides:

1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
2. The invocation and benediction, if used, shall be given by a student volunteer; and
3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

graduation ceremony. The Court reasoned that Lee's actions represent governmental coercion to participate in religious activities, a paradigmatic establishment of religion. The Court then granted certiorari in this case, vacated our judgment, and remanded it to us for further consideration in light of *Lee. Jones v. Clear Creek Indep. Sch. Dist.*, 505 U.S. ___, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). Upon reconsideration, we hold that *Lee* does not render Clear Creek's invocation policy unconstitutional, and again affirm the district court's summary judgment in Clear Creek's favor.

I. THE SUPREME COURT TELLS THIS COURT WHAT THE ESTABLISHMENT CLAUSE MEANS

Of the six forms of argument recognized in constitutional interpretation,[2] it is the doctrinal arguments that control Establishment Clause cases.[3] Although the Supreme Court's doctrinally-centered manner of resolving Establishment Clause disputes may be credited with accommodating a society of remarkable religious diversity, it requires considerable micromanagement of government's relationship to religion as the Court decides each case by distilling fact-sensitive rules from its precedents.

---

[2] *See* PHILIP BOBBITT, CONSTITUTIONAL FATE 7, 93-94 (1982) (defining six categories of legitimate constitutional argument: historical, textual, structural, prudential, doctrinal, and ethical).

[3] *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 18-20 (1991) (employing an Establishment Clause hypothetical to explain doctrinal argument).

For example, in *Lynch v. Donnelly*, 465 U.S. 668, 681-82, 104 S.Ct. 1355, 1363-64, 79 L.Ed.2d 604 (1984), the Court compared the effect that a city's display of a nativity scene had on the advancement or endorsement of religion to the effect of governmental actions that it had considered in previous cases, and concluded that display of the nativity scene did not violate the Establishment Clause. *Id.* at 687, 104 S.Ct. at 1366. Then, in *County of Allegheny v. ACLU*, 492 U.S. 573, 598-600, 109 S.Ct. 3086, 3103-05, 106 L.Ed.2d 472 (1989), the Court held that a county's display of a nativity scene violated the Establishment Clause because, *inter alia*, it was surrounded by flora, instead of Santa Claus and reindeer as was the nativity scene at issue in *Lynch*.[4]

The Court has repeatedly held that the Establishment Clause forbids the imposition of religion through public education. That leads to difficulty because of public schools' responsibility to develop pupils' character and decisionmaking skills, a responsibility more important in a society suffering from parental failure. If religion be the foundation, or at least relevant to these functions and to the education of the young, as is widely believed, it follows that religious thought should not be excluded as irrelevant to public education. There is a deep public concern that radical efforts to avoid pressuring children

---

[4] Some say that the Court has thus found a "three plastic animals rule" in the Constitution. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U.CHI.L.REV. 115, 127 (1992).

to be religious actually teach and enforce notions that pressure the young to avoid all that is religious.[5]

Nevertheless, it is neither our object nor our place to opine whether the Court's Establishment Clause jurisprudence is good, fair, or useful. What the Establishment Clause finally means in a specific case is what the Court says it means. We sit only to apply the analytical methods sanctioned by the Court in accord with its precedent.

II. FROM *LEMON* TO *LEE*

In *Jones I*, we applied *Lemon's* tripartite test[6] rather than the historical approach that the Court employed in *Marsh v. Chambers*, 463 U.S. 783, 792, 103 S.Ct. 3330, 3336, 77 L.Ed.2d 1019 (1983). *Jones I*, 930 F.2d at 419 (citing *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 383, 105 S.Ct. 3216, 3222 (1985), and *Edwards v. Aguillard*, 482 U.S. 578, 583 n. 4, 107 S.Ct. 2573, 2577 n. 4, 96 L.Ed.2d 510 (1987)). The *Lee* Court agreed that *Marsh's* historical analysis is inappropriate, ___ U.S. at ___, 112 S.Ct. at 2660, yet it considered Lemon analysis unnecessary to decide

---

[5] *See Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 248, 110 S.Ct. 2356, 2371, 110 L.Ed.2d 191 (1990) ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.").

[6] *Lemon* holds that, to satisfy the Establishment Clause, "a governmental practice must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." *Lee*, ___ U.S. at ___, 112 S.Ct. at 2654 (citations omitted).

whether Lee violated the Establishment Clause.[7] The Court instead held Lee's actions unconstitutional under a coercion analysis. *Id.* ___ U.S. at ___, 112 S.Ct. at 2655. At least four Justices would also hold that Lee's actions had the effect of unconstitutionally endorsing religion. *Id.* ___ U.S. at ___, 112 S.Ct. at 2665 n. 9 (Blackmun, J., concurring), at ___, 112 S.Ct. at 2671-72 (Souter, J., concurring).

Thus, in the time between Lemon and Lee, the Court has used five tests to determine whether public schools' involvement with religion violates the Establishment Clause. To fully reconsider this case in light of *Lee*, we reanalyze the Resolution under all five tests that the Court has stated are relevant.[8] We address any statements in *Lee* that bear on our analysis in *Jones I* and apply *Lee's* coercion test for the first time.

---

[7] The Court stated:

> We can decide th[is] case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation of [Lee] and *amicus* the United States to reconsider our decision in *Lemon*. . . .

Id. ___ U.S. at ___, 112 S.Ct. at 2655; *but cf. id.* ___ U.S. at ___, 112 S.Ct. at 2685 (Scalia, J., dissenting) (equating Court's neglect of *Lemon* with rejection).

[8] *See Lynch*, 465 U.S. at 679, 104 S.Ct. at 1362 (Establishment Clause "erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship' " and Court is "unwilling[ ] to be confined to any single test or criterion in this sensitive area") (citations omitted); *Lee*, ___ U.S. at ___, 112 S.Ct. at 2661 ("Establishment Clause jurisprudence remains a delicate and fact sensitive one. . . . ").

A. SECULAR PURPOSE

Nothing in *Lee* abrogates our conclusion that the Resolution has a secular purpose of solemnization, and thus satisfies *Lemon's* first requirement. *See Jones I*, 930 F.2d at 419-21. The Resolution represents Clear Creek's judgment that society benefits if people attach importance to graduation. A meaningful graduation ceremony can provide encouragement to finish school and the inspiration and self-assurance necessary to achieve after graduation, which are secular objectives.

The *Lee* Court stated that the Providence school district's solemnization argument would have "considerable force were it not for the constitutional constraints applied to state action. . . . " ___ U.S. at ___, 112 S.Ct. at 2660. The Court did not question its members' previous acknowledgements that solemnization is a legitimate secular purpose of ceremonial prayer. *See Allegheny*, 492 U.S. at 595 n. 46, 109 S.Ct. at 3102 n. 46; *id.* at 630, 109 S.Ct. at 3120-21 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 693, 104 S.Ct. at 1369-70 (O'Connor, J., concurring); *see also Engel v. Vitale*, 370 U.S. 421, 435 n. 21, 82 S.Ct. 1261, 1269 n. 21, 8 L.Ed.2d 601 (1962). Thus, we take the *Lee* Court to agree with our holding in *Jones I* that a law may pass *Lemon's* secular-purpose test by solemnizing public occasions, yet still be stricken as an unconstitutional establishment under another test mandated by the Court. *See Jones I*, 930 F.2d at 420.

B. PRIMARY EFFECT

In *Jones I*, we held that the Resolution's *primary* effect was to solemnize graduation ceremonies, not to "advance religion" in contravention of *Lemon's* second requirement. *Id.*, at 421-22. *Lee* calls into question three statements that we made in support of our advancement holding. We stated that graduating high school seniors would be less easily influenced by prayer than would be their junior schoolmates, *id.* at 421, but the Court held that all students under school supervision would be unduly influenced by Rabbi Gutterman's prayers. *Lee*, ___ U.S. at ___, 112 S.Ct. at 2658. We distinguished the graduation setting from the classroom setting because parents and guests are present only at graduation and school officials can pay much greater attention to individual students in the classroom than at graduation, *Jones I*, 930 F.2d at 422, but the Court stated that the two settings are "analogous." *Lee*, ___ U.S. at ___, 112 S.Ct. at 2660. We stated that the brevity and infrequency of the permissible prayers under the Resolution tempered any advancement of religion, *Jones I*, 930 F.2d at 422, but the Court rejected a *de minimis* characterization of the brief prayers at issue in *Lee*. ___ U.S. at ___, 112 S.Ct. at 2659.

Lee commands that we not rely on these three points in deciding whether the Resolution's primary effect is to advance religion. Yet even without them, we remain convinced that the Resolution's primary effect is to solemnize graduation ceremonies.

The Resolution can only advance religion by increasing religious conviction among graduation attendees, which means attracting new believers or increasing the

faith of the faithful. Its requirement that any invocation be nonsectarian and nonproselytizing minimizes any such advancement of religion. The *Lee* Court held that the nonsectarian nature of the prayers there at issue did not change the fact that Lee directed graduation attendees to participate in a religious exercise. ___ U.S. at ___, 112 S.Ct. at 2656; *see also id.* at ___, 112 S.Ct. at 2667-71 (Souter, J., concurring). Nevertheless, the nonsectarian nature of a prayer remains relevant to the extent to which a prayer advances religion.

The fact that *Lemon* only condemns government action that has the *primary* effect of advancing religion, *see Lemon*, 403 U.S. at 612, 91 S.Ct. at 2111, requires us to compare the Resolution's secular and religious effect. The Resolution may or may not have any religious effect. The students may or may not employ the name of any deity; heads may or may not be bowed; indeed, an invocation may or may not appear on the program. If the students choose a nonproselytizing, nonsectarian prayer, the effect may well marshall attendees' extant religiosity for the secular purpose of solemnization; but no one would likely expect the advancement of religion by the initiation or increase of religious faith through these prayers. The Resolution's primary effect is secular.

C. ENTANGLEMENT

We held in *Jones I* that the Resolution's proscription of sectarianism does not, of itself, excessively entangle government with religion. We know of no authority that

holds yearly review of unsolicited material for sectarianism and proselytization to constitute excessive entanglement. Cf. *Weisman v. Lee*, 908 F.2d 1090, 1095 (1st Cir.1990) (Bownes, J., concurring) (finding excessive entanglement where school district directs that a prayer be given, chooses a clergy member to deliver the prayer, and requests that prayer be nonsectarian and nonproselytizing), *aff'd*, ___ U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); *id.*, at ___, 112 S.Ct. at 2617 (Souter, J., concurring) (state decisions as to sectarianism constitute illicit comparative theology). Moreover, nothing in *Lee* abrogates our reading of the Court's entanglement precedent to limit violative entanglement to *institutional* entanglement. *Jones I*, 930 F.2d at 423 (citing, *inter alia*, *Lynch*, 465 U.S. at 689, 104 S.Ct. at 1368 (O'Connor, J., concurring)). That a rabbi wrote and delivered the prayer at issue in *Lee* makes entanglement analysis relevant to that case, but the Resolution keeps Clear Creek free of all involvement with religious institutions.

D. ENDORSEMENT

Like *Lemon's* advancement test, the Court's endorsement analysis focuses on the *effect* of a challenged governmental action. This is why, perhaps mistakenly, we conflated advancement and endorsement analysis in *Jones I*. Because the Court has never tolerated a government endorsement of religion that is incidental to a primary secular effect, as it has with incidental religious advancements, we will not now compare endorsement to legitimate effects of the Resolution. *See Allegheny*, 492 U.S. at 595 & n. 46, 109 S.Ct. at 3102 & n. 46 (Justice Blackmun,

writing for himself and Justice Stevens, rejects any and all government endorsement of religion).

From the Court's various pronouncements, we understand government to unconstitutionally endorse religion when a reasonable person would view the challenged government action as a disapproval of her contrary religious choices. *See Lee*, ___ U.S. at ___, 112 S.Ct. at 2665 n. 9 (Blackmun, J., concurring) (unconstitutional endorsement when "government makes adherence to religion relevant to a person's standing in the political community") (quoting *Wallace v. Jaffree*, 472 U.S. 38, 69, 105 S.Ct. 2479, 2496, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring)); *Allegheny*, 492 U.S. at 631, 109 S.Ct. at 3121 (O'Connor, J., concurring) ("The question under endorsement analysis . . . is whether a reasonable observer would view [government action] as a disapproval of his or her particular religious choices. . . . ").

We may compare the Resolution to the facts in two somewhat similar cases where members of the Court discussed endorsement of religion. Both *Lee* concurrences consider invocations directed by Lee to be unconstitutional endorsements of religion. ___ U.S. at ___, 112 S.Ct. at 2665-66 (Blackmun, J., concurring); *id.* at ___, 112 S.Ct. at 2677-78 (Souter, J., concurring). These concurrences attracted the votes of four Justices,[9] including Justice O'Connor, who first articulated the endorsement test for the Court in *Lynch*, 465 U.S. at 688-89, 104 S.Ct. at 1367

---

[9] Justice Kennedy, writing for the Court, took no position on endorsement in *Lee*. Justice Scalia, writing for the four dissenters, found no endorsement on the facts in *Lee*. *Id.* ___ U.S. at ___, 112 S.Ct. at 2683-84 (Scalia, J., dissenting).

(O'Connor, J., concurring). On the other hand, a plurality of the Court recently held that a public school does not unconstitutionally endorse religion by permitting a Christian club to meet on school grounds after class and recruit members through the school's newspaper, bulletin boards, public address system, and annual Club Fair, as long as the school accords equal privileges to other non-curriculum-oriented student organizations. *See Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 247-53, 110 S.Ct. 2356, 2370-73, 110 L.Ed.2d 191 (1990).

To compare the Resolution with *Lee* and *Mergens*, we consider exactly what it does. Unlike the policy at issue in *Lee*, it does not mandate a prayer. The Resolution does not even mandate an invocation; it merely permits one if the seniors so choose. Moreover, the students present Clear Creek with *their* proposed invocation under the Resolution, while in *Lee* the school explained its idea for an invocation to a member of an organized religion and directed him to deliver it. ___ U.S. at ___, 112 S.Ct. at 2652-53. The Resolution is passive compared to the governmental overture toward religion at issue in *Lee*.

Concerning endorsement, the instant case more closely parallels *Mergens* because a graduating high school senior *who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer* will understand that any religious references are the result of student, not government, choice. The *Mergens* plurality states the point directly:

> there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free

> Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

496 U.S. at 250, 110 S.Ct. at 2372. In *Jones I*, we recognized that invocations permitted by the Resolution "may" include supplication to a deity. 930 F.2d at 417 n. 1. But the Resolution permits invocations free of all religious content, and the 1987 student proposal was acceptable to the plaintiff-appellants. *See id.* at 420 n. 3. The record does not disclose how each senior class chooses whether to include an invocation nor how the student volunteer who delivers the speech is chosen.[10] We can imagine discriminatory methods of implementing the Resolution that would make it a tool for governmental endorsement of religion, but the Resolution itself is constitutional unless there is no way to implement it on a nondiscriminatory basis.

We think that Clear Creek does not unconstitutionally endorse religion if it submits the decision of graduation invocation content, if any, to the majority vote of the senior class. Clear Creek is legitimately concerned with solemnizing its graduation ceremonies, and the Resolution simply permits each senior class to decide how

---

[10] The appellants ask us to remand this case so that they can adduce evidence of unconstitutional applications of the Resolution. We understand our present task to be limited to determining of the Resolution's facial constitutionality, and nothing in this case prevents the appellants from filing a declaratory judgment action if they believe that the Resolution has been unconstitutionally applied. *See Jones I*, 930 F.2d at 423-24.

this can best be done. School districts commonly provide similarly secular criteria for the selection of other student graduation speakers, and no court has held that their religious speech at graduation represents government endorsement of religion.[11] *Cf. Guidry v. Broussard*, 897 F.2d 181, 182 (5th Cir.1990) (relying on defendants' immunity to avoid deciding whether school liable for censoring valedictorian's religious graduation address). After participating in a student determination of what kind of invocation their graduation will contain, we do not believe that students will perceive any more government endorsement of religion from the Resolution than do students in Westside Community schools who are regularly recruited during school hours to join a Christian club. Clear Creek students certainly perceive a less-direct relationship between state and religion under the Resolution than Providence students did before *Lee*. *See Lee*, ___ U.S. at ___, 112 S.Ct. at 2661 ("[A]t graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.") (citing *Mergens*). We find no unconstitutional endorsement.

E. COERCION

Instead of directly considering any of the tests that we have previously discussed, the *Lee* Court invalidated

---

[11] That some attendees choose to stand and remain silent during an invocation is indistinguishable from their decision to accord a standing ovation to a moving valedictory address with religious inferences.

the Providence school district's policy on its evaluation of the coercive effect of Lee's actions. The Court held that Lee *coerced* graduation attendees to join in a formal religious exercise. *Lee*, at ___, 112 S.Ct. at 2655. The Court summarized its entire analysis of the constitutionality of the school policy at issue in *Lee* as follows:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory. . . .

Id. Thus, *Lee* identifies unconstitutional coercion when (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors. *See also Mergens*, 496 U.S. at 261, 110 S.Ct. at 2378 (Kennedy, J., concurring) ("The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity."). Before *Lee*, no one contended that the Resolution coerced participation in prayer at Clear Creek's graduation ceremonies, and we failed to appreciate the need to address this issue from the Court's precedent that we discussed in *Jones I*. Upon considering this case in light of *Lee's* coercion analysis, we find that the Resolution does not succumb to one, let alone all three, of the elements of unconstitutional coercion, and thus survives the analysis that felled graduation prayer in *Lee*.

1. *Direction*

Throughout *Lee 's* entire coercion analysis, the Court repeatedly stresses the government's direct and complete control over the graduation prayers there at issue as determinative of the establishment question. *E.g.*, ___ U.S. at ___, 112 S.Ct. at 2655 ("[G]overnment involvement . . . is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school [which] suffices to determine the [constitutional] question. . . . "); *id.* at ___, 112 S.Ct. at 2656 (First Amendment does not "permit the government to undertake [the task of defining common ground necessary for the spiritual development of humankind] for itself"); *id.* at ___, 112 S.Ct. at 2657 ("The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State. . . . "); *id.* at ___, 112 S.Ct. at 2658 ("[I]f citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard [its people's freedom of conscience]."); *id.* (a graduating senior at a Providence graduation ceremony would have "a reasonable perception that she is being forced by the State to pray"); *id.* at ___, 112 S.Ct. at 2659 ("[T]he State . . . in effect required participation in a religious exercise."); *id.* at ___, 112 S.Ct. at 2660 ("[T]he state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise. . . . "); *id.* at ___, 112 S.Ct. at 2661 ("The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise. . . . ").

The Court deplored three instances of government involvement in graduation prayer in *Lee*, none of which is tolerated, let alone prescribed, by the Resolution. First, the Court found that Lee "decided that an invocation and benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." *Id.* at ___, 112 S.Ct. at 2655. The Resolution requires that the state not decide whether an invocation will occur; it respects the graduating class's choice on the matter. The Resolution acknowledges that a school official may offer "advice and counsel" to the senior class in deciding whether to include invocations at graduation, and officials could exploit this clause to impose their will on the students. But, again,[12] in evaluating the Resolution's facial constitutionality, we are only concerned with whether the Resolution necessarily charges government with the decision of whether to include invocations. Unlike the policy at issue in *Lee*, the Resolution does not.

Second, the Court was critical of the fact that "[t]he principal chose the religious participant, here a rabbi, and that choice is also attributable to the State." *Id.* In contrast, the Resolution explicitly precludes anyone but a student volunteer from delivering Clear Creek's invocations. Moreover, the Resolution says nothing of government involvement in the selection of the person who delivers any invocation. That the government can remain detached from this selection consistent with the Resolution maintains the Resolution's facial constitutionality.

---

[12] *See supra* note 10 and accompanying text.

The Court recognized that Lee completed his control over the invocation at his school's graduation ceremonies when he "provided Rabbi Gutterman with a copy of the 'Guidelines for Civic Occasions,' and advised him that his prayers should be nonsectarian." *Id.* at ___, 112 S.Ct. at 2656. In three respects, Clear Creek exercises significantly less control over the content of invocations at its schools. Clear Creek does not solicit invocations; the Resolution only forbids Clear Creek schools from accepting sectarian or proselytizing invocations. Moreover, because a graduating senior drafts proposed invocations each year under the Resolution, the same person will never repeatedly propose an invocation. Compare *id.* (noting that Lee could refine an official prayer by repeatedly inviting the same clergy member to deliver invocations). Finally, the Resolution imposes two one-word restrictions "nonsectarian and nonproselytizing" which enhance solemnization and minimize advancement of religion, instead of a pamphlet full of invocation suggestions.

We conclude that Clear Creek does not direct prayer presentations at its graduation ceremonies.

2. *Religiosity*

Lee directed Rabbi Gutterman to pray, and the Court characterized this as a "formal religious observance." *Id.* at ___, 112 S.Ct. at 2655. By contrast, the Resolution tolerates nonsectarian, nonproselytizing prayer, but does not require or favor it.

3. *Participation*

The Lee Court held that government-mandated prayer at graduation places a constitutionally impermissible amount of psychological pressure upon students to participate in religious exercises. *Id.* at ___, 112 S.Ct. at 2658-59. We think that the graduation prayers permitted by the Resolution place less psychological pressure on students than the prayers at issue in *Lee* because all students, *after having participated in the decision of whether prayers will be given,* are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy.

We also consider the age of the graduating seniors relevant to the determination of whether prayers under the Resolution can coerce these young people into participating in a religious exercise. *See Jones I,* 930 F.2d at 421. *Lee* explains that the *state-initiated clergy prayers there at issue* have a coercive effect on public-school students regardless of age, *see* ___ U.S. at ___, 112 S.Ct. at 2658-59, but it nowhere compromises the Court's previous recognition that graduating seniors "are less impressionable than younger students." *Mergens,* 496 U.S. at 235-37, 110 S.Ct. at 2364-65 (approving Congress' extension of the Court's reasoning in *Widmar v. Vincent,* 454 U.S. 263, 274 n. 14, 102 S.Ct. 269, 276-77 n. 14, 70 L.Ed.2d 440 (1981), that age is inversely proportional to impressionability, from university students to secondary school students); *see also id.* 496 U.S. at 250, 110 S.Ct. at 2372 (endorsing Justice Powell's dissent in *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 556, 106 S.Ct. 1326, 1339, 89 L.Ed.2d 501 (1986)).

Accordingly, we think that the coercive effect of any prayer permitted by the Resolution is more analogous to the innocuous "God save the United States and this Honorable Court" stated *by and to* adults than the government-mandated message delivered to young people from religious authority that the Court considered in *Lee*. *Cf. Lee*, ___ U.S. at ___, 112 S.Ct. at 2659 (refusing to "address whether [the choice between participation and protest] is acceptable if the affected citizens are mature adults").[13]

None of *Lee's* three elements of coercive effect exist here. Prayers allowed under the Resolution do not unconstitutionally coerce objectors into participation.

III. FROM SEA TO SHINING SEA, GREAT GOD OUR KING[14]

The practical result of our decision, viewed in light of *Lee*, is that a majority of students can do what the State

---

[13] Nor did the Court criticize the fact that, before Rabbi Gutterman delivered the prayers ordered by Lee, the assembly stood for the Pledge of Allegiance, which of course recounts our subjugation to a deity. *See id.* ___ U.S. at ___, 112 S.Ct. at 2653; *id.* at ___, 112 S.Ct. at 2682 (Scalia, J., dissenting).

[14] America! America!
God shed His grace on thee,
And crown thy good with brotherhood
From sea to shining sea.

America the Beautiful

Long may our land be bright.
With freedom's holy light;
Protect us by Thy might,
Great God, our King.

America

acting on its own cannot do to incorporate prayer in public high school graduation ceremonies. In *Lee*, the Court forbade schools from exacting participation in a religious exercise as the price for attending what many consider to be one of life's most important events. This case requires us to consider *why* so many people attach importance to graduation ceremonies. If they only seek government's recognition of student achievement, diplomas suffice. If they only seek God's recognition, a privately-sponsored baccalaureate will do. But to experience the community's recognition of student achievement, they must attend the public ceremony that other interested community members also hold so dear. By attending graduation to experience and participate in the community's display of support for the graduates, people should not be surprised to find the event affected by community standards. The Constitution requires nothing different.[15]

We again affirm the district court's judgment denying injunctive and declaratory relief from the Resolution.

AFFIRMED.

---

[15] *Cf. Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

Nos. 94-1268 & 94-1314

FEB 24 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOINT SCHOOL DISTRICT NO. 241, *et al.*,

Petitioners,

—v.—

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her child SAMUEL HARRIS.

CITIZENS PRESERVING AMERICA'S HERITAGE, INC., *et al.*,

Cross-Petitioners,

—v.—

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her child SAMUEL HARRIS.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Steven R. Shapiro
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Stephen L. Pevar
Counsel of Record
American Civil Liberties Union Foundation
6825 East Tennessee, Suite 530
Denver, Colorado 80224
(303) 321-4828

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether public school officials, who must and do retain a high degree of control over the precise contents of a school commencement program, can authorize students to transform this government program into a religious service without thereby violating the Establishment Clause.

2. Whether a government program in which only one religious group is allowed to speak can be considered a public forum.

3. Whether the Free Speech Clause authorizes a religious group to use a government program for proselytizing, even though this clearly violates the Establishment Clause.

LIST OF PARTIES

Phyllis Wright Harris filed this case, as her complaint states, "on her own behalf and on behalf of her three minor children, Beverly, Billy, and Samuel Harris." At the time of filing, all three children were students in the defendant school district. However, Beverly has since graduated from high school and Billy no longer matriculates in this school district. The only remaining student with standing to pursue this case is Samuel Harris, and Samuel graduates on June 2, 1995.

The caption used by the Harrises on this brief in opposition reflects the current status of the parties. For some unexplained reason, petitioners and cross-petitioners have deleted Billy from their captions, but not Beverly.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ISSUE PRESENTED BY THIS CASE 5

II. THE DECISION BELOW IS CORRECT AND CONSISTENT WITH THIS COURT'S PRECEDENTS 6

A. Petitioners' Policy Violates The Establishment Clause 6

B. The Free Speech And Free Exercise Claims Raised In This Case By Cross-Petitioners Have Been Repeatedly Rejected By This Court And Were Properly Rejected By The Court Of Appeals 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Abington School District v. Schempp,
374 U.S. 203 (1947) 8, 9

Bethel School District v. Fraser,
478 U.S. 675 (1986) 4

Board of Education v. Mergens,
496 U.S. 226 (1990) 7, 10

Committee for Public Education and Religious Liberty v. Nyquist,
413 U.S. 756 (1973) 9

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,
473 U.S. 788 (1985) 11

County of Allegheny v. American Civil Liberties Union,
492 U.S. 573 (1989) 8

Edwards v. Aguillard,
482 U.S. 578 (1987) 8

Engel v. Vitale,
370 U.S. 421 (1962) 7, 12

Epperson v. Arkansas,
493 U.S. 907 (1968) 8

Jackson v. Metropolitan Edison Co.,
419 U.S. 345 (1974) 7

Jones v. Clear Creek Independent School District,
977 F.2d 963 (1992),
cert. denied, 113 S.Ct. 2950 (1993) 5, 6

Page

Lebron v. National Railroad Passenger Corp., 63 U.S.L.W. 4109 (Feb. 21, 1995) 7

Lee v. Weisman, 505 U.S. __, 112 S.Ct. 2649 (1992) 2, 4, 5, 9

Shelton v. Tucker, 364 U.S. 479 (1960) 8

Stone v. Graham, 449 U.S. 39 (1980) 11

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 10

Weinstein v. Bradford, 423 U.S. 147 (1979) 1

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 6, 9

Respondents submit this brief in opposition to the petition and cross-petition for *certiorari* in Nos. 94-1268 and 94-1314.

STATEMENT OF THE CASE

Petitioners' statement of the case is incomplete. Several critical facts are omitted, and some statements are erroneous. A more accurate statement follows.

1. This case was filed on April 12, 1991, by Phyllis Wright Harris on behalf of herself and her three children, Beverly, Billy, and Samuel Harris. Beverly graduated in 1991 from Grangeville High School; Billy no longer attends school in this district; and Samuel, a senior this year, graduates on June 2, 1995. Thus, after that date, none of the Harris children will any longer be a student in petitioners' school district.[1]

2. Beverly Harris was a senior at Grangeville High School when this case was filed in 1991. School officials permitted Beverly's class to vote on whether religious practices would be inserted into the school's upcoming commencement ceremony. Beverly's class opted to insert two prayers and one religious hymn into the program. On Beverly's behalf, a preliminary injunction was sought in district court to halt these religious activities, but the court denied the injunction. Beverly, therefore, had no choice but to endure religious practices in order to participate in one of

---

[1] According to cross-petitioners, this case presents a "timely opportunity" to decide certain First Amendment issues. Cross-Pet. at 14. Given Samuel's graduation date, this is not necessarily true. Indeed, under this Court's decision in *Weinstein v. Bradford*, 423 U.S. 147 (1979), it would appear that this case may well become moot when Samuel graduates.

the most important events of her life.[2]

3. This Court has held that "teachers and principals must and do retain a high degree of control over the precise contents of the [graduation] program." *Lee v. Weisman*, 505 U.S. __, 112 S.Ct. 2649, 2660 (1992). It is therefore significant that the school district in this case concedes that it "allow[s] the students to dictate the content of graduation," and that "[n]o implied restrictions are placed on the graduating seniors" in this regard. Pet. at 6. The principal of Grangeville High School testified that, under the school district's written policy, students are authorized to transform the *school's* graduation program into "a religious service." CR 51 at 112.[3] The superintendent of schools, who wrote this policy, testified that the policy authorizes students to dictate the content of these ceremonies, "no matter how religious they are." CR 50 at 58.

4. As the court below noted, the public school underwrites these commencement programs with taxpayer funds, providing "the building, chairs, platform for speakers, sound system, secretarial help, and janitorial staff," and also defrays the cost of the written Program in which the prayers and hymns are listed. Pet.App. B-21, B-19. Thus, the most important facts are not in dispute: Children are allowed, by a simple majority vote, to transform a government program into a religious service (containing as much denominational dogma as they wish); paid for by government funds; sponsored by the school district; in which school officials participate, and over which these officials have ultimate control.

5. The prayers that were given during Beverly's cere-

---

[2] Petitioners state that "Mrs. Harris' oldest child [Beverly] left Grangeville High before graduating." Pet. at 7-8. This is erroneous.

[3] The designation "CR" refers to the clerk's record in the district court.

mony[4] were Christian prayers. They invoked Jesus and the Holy Spirit. They used the word "Lord" 15 times. CR 48 at 7. The religious hymn that also was inserted into Beverly's graduation program contained such messages as "We want You to find us living what is true. Lord, remind us who we are in You." No evidence was introduced in the district court indicating that this hymn had anything other than a religious purpose and effect.

6. In support of her motion for a preliminary injunction in 1991, Beverly testified: "I feel like school officials are telling me that I am not as good as the other students. I also feel as if I am being pressured to conform, and to accept someone else's version of what is an acceptable religious belief." Beverly also testified that, when she voiced her opposition to these religious activities during the school's voting process, she was retaliated against by other students. "Now I am being treated like an outcast." CR 1(F).

7. Petitioners state that Grangeville's 1990 senior class (when Beverly was a junior) "declined to include any non-secular music, prayer or speech" in the school graduation program. Pet. at 7. This is erroneous. As the written Program records, this event contained an invocation delivered *by clergy* and students sang a "Musical Benediction." CR 48, p. 8, No. 10.

8. Cross-petitioners (the student-intervenors) claim that "no one who attends a graduation ceremony in District No. 241 is ever asked to participate in any prayer during the graduation ceremony." Cross-Pet. at 3. This statement is

---

[4] The only hearing held in this case occurred in 1991. Accordingly, the facts adduced at this hearing constitute the record. All parties concede that the religious activities that occurred during Beverly's ceremony are illustrative of the religious activities authorized by the school district's policy.

misleading. Remaining respectfully silent during prayer is conventionally viewed as "signif[ying] . . . participation or approval of it." *Lee v. Weisman*, 112 S.Ct. at 2658. In this sense, Beverly was not only asked to -- she was compelled to -- participate in two prayers and a religious hymn at her graduation. Similarly, Samuel's classmates have voted to compel him to participate in religious activities this June 2. Any notion that these children were not asked to participate in religious activities "is formalistic in the extreme." *Id.* at 2659.

9. Cross-petitioners claim that the Grangeville High School graduation ceremony is a public forum. The record refutes this claim. It is undisputed that a religious majority dictates the ceremony's content and monopolizes the podium. Only one view is heard, and all others are barred. Pet.App. B-27. Therefore, this is not a public forum. Even the school district does not contend that its graduation ceremony is a public forum.

REASONS FOR DENYING THE WRIT

Public school students have no independent right to dictate the content of a *school's* commencement program. No one in this case disputes that fact. *See Lee v. Weisman*, 112 S.Ct. at 2660 (school officials "must and do retain a high degree of control over the precise contents of the [graduation] program").[5]

Without abdicating its ultimate authority, the Grangeville school district has nonetheless allowed students to "dictate" the school's graduation program. Students have even been delegated the authority to transform the school's pro-

---

[5] *Cf. Bethel School District v. Fraser*, 478 U.S. 675, 683 (1986)("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board").

gram into a religious service. Armed with this power, Grangeville students have fashioned graduation programs that would make the activity in *Lee v. Weisman* appear sterile. These programs have included denominational, clergy-delivered prayers; denominational prayers offered by students; and religious hymns -- sometimes all in the same program.

The Ninth Circuit was clearly correct in declaring this scheme unconstitutional. There is no reason for this Court to review this decision.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ISSUE PRESENTED BY THIS CASE

Petitioners and cross-petitioners contend that the decision of the Ninth Circuit in *Harris* conflicts with the Fifth Circuit's decision in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (1992), *cert. denied*, 113 S.Ct. 2950 (1993). However, these decisions are significantly distinguishable. True, both cases involve the broad question of school sponsorship of student-initiated prayer in school commencement exercises. But the actual issue in *Jones* was the facial validity of a school policy that permitted high school seniors to deliver "nonsectarian, nonproselytizing invocations at their graduation ceremonies." *Id.* at 964, 969 n.10. In upholding this policy, the court admonished that the plaintiffs could seek further relief if this policy were violated. *Id.* at 969 n.10.

In sharp contrast, *Harris* considered a policy that allows high school seniors to inject all of the following religious activities into the school ceremony: (1) as many denominational, proselytizing prayers as the students wish, (2) all delivered by clergy, and (3) an unlimited number of religious hymns and other religious messages. As petitioners con-

cede, the Grangeville policy "does not attempt to insure non-sectarian or non-proselytizing content" of the school's graduation program, and there are "[n]o implied restrictions" on the amount of religious content it can contain. Pet. at 5. In fact, the school district "allow[s] the students to dictate the content of graduation." *Id.* at 6. There is nothing in *Jones* suggesting that the Fifth Circuit would -- or that any court would -- sustain a policy such as this. In any event, *Jones* did not consider such a policy.

II. THE DECISION BELOW IS CORRECT AND CONSISTENT WITH THIS COURT'S PRECEDENTS

A. Petitioners' Policy Violates The Establishment Clause

Petitioners' policy contains an inherent constitutional flaw. It rests on an erroneous concept: that a government activity ceases to be a government activity when a religious majority is allowed to control it. The framers of the Constitution chose a different path for our nation. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

Hundreds of activities long recognized as unconstitutional would be officially sanctioned under Grangeville's scheme. All that government officials need do is bind themselves to the outcome of a vote. If the majority then votes to usurp the government activity for a private religious purpose, the government would be obligated to finance and sponsor it. In the school context, majorities could vote to begin every class with prayer, and vote to post the Ten Commandments in every classroom. Indeed, this same prin-

ciple would permit each agency of government to allow constituents to insert their own religious activities into every government program.

The prayers (and other religious activities) inserted by students into Grangeville's official graduation program constitute state action in every relevant sense. They are advertised on the state's Program, included as an integral part of the government event, and are able to be offered from this podium only because the government has provided the financial and supervisory resources. Moreover, given that the government has the ultimate authority to prohibit these prayers from the official program, the decision to include them precludes any claim of government neutrality.[6] To paraphrase the Court's most recent state action decision: "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply [deferring to a majority vote]." *Lebron v. National Railroad Passenger Corp.*, 63 U.S.L.W. 4109, 4116 (Feb. 21, 1995).

Petitioners contend that a school district can somehow "remain neutral [while] allow[ing] the students to dictate the content of graduation." Pet. at 6. This cannot be true. Every time children dictate the insertion of religious activity into a school program, the school loses its neutrality. It is not the prayers, of course, that violate the Constitution; it is their placement into an official government program. *Compare Engel v. Vitale*, 370 U.S. 421 (1962), with *Board of Education v. Mergens*, 496 U.S. 226 (1990).

Students at Grangeville High who desire it are free to organize a private, religious baccalaureate service before or after graduation. But, contrary to petitioners' assertion,

---

[6] Thus, cases such as *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), are patently inapposite.

school officials violate their constitutional obligation of neutrality when they allow prayers to be included in the government program. "The Constitution mandates that the government remain secular, rather than affiliating itself with religious beliefs or institutions . . . ." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 610 (1989). *See also Abington School District v. Schempp*, 374 U.S. 203, 226 (1947)("In the relationship between man and religion, the State is firmly committed to a position of neutrality").

Government neutrality is particularly important in the public school. "'[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Epperson v. Arkansas*, 493 U.S. 907, 104 (1968), quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). *See also Edwards v. Aguillard*, 482 U.S. 578, 583 (1987)("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause" in public schools).

Petitioners' religious activities -- and these prayers *are* the school district's -- violate the Establishment Clause. The fact that students initiate them does not change the fact that they are being offered as part of the government's own program, thereby forfeiting government neutrality. Church and state have been joined.

B. The Free Speech And Free Exercise Claims Raised In This Case By Cross-Petitioners Have Been Repeatedly Rejected By This Court And Were Properly Rejected By The Court Of Appeals

Petitioners make no Free Speech or Free Exercise argument, but cross-petitioners do. Cross-petitioners contend that, even if these religious activities otherwise constitute

Establishment Clause violations, they are saved by the free speech and free exercise rights of the students who want these prayers included in the school program.

This argument is wrong on the facts and wrong on the law. It is wrong on the facts because cross-petitioners are not merely seeking the right to engage in private religious expression. They are demanding that the state promote, sponsor and finance that religious expression by including it in an official school program. It is also wrong on the law. As this Court pointedly noted in *Abington School District v. Schempp*, 374 U.S. at 226, "[w]hile the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the state to practice its beliefs" (emphasis in original).

Cross-petitioners' only response to this well-established law is to argue that a tension exists in this case between their individual rights and the Establishment Clause. But a similar tension exists in *all* Establishment Clause cases. By definition, the Establishment Clause restricts a certain manner of expression: namely, religious expression sponsored by the state. Free speech stops at this wall. Simply put, there is no right to compel a violation of the Establishment Clause. *See Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973)(citations omitted):

> [T]his Court repeatedly has recognized that tension inevitably exists between the Free Exercise and Establishment Clauses . . . . As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion.

See also West Virginia Board of Education v. Barnette, 319 U.S. at 638; *Lee v. Weisman*, 112 S.Ct. at 2657-58, 2660.

Cross-petitioners either ignore or fail to grasp the distinction between private religious speech and state-sponsored religious activity. Thus, they claim: "Where the impetus for religious activity is purely of private initiative and design . . . there is no state action and the Establishment Clause does not proscribe the conduct." Cross-Pet. at 19.

The flaw in that reasoning is apparent. A majority can initiate and design religious practices, but it cannot use the machinery of the state to promote them. Prayers (and other religious practices) inserted into a public school graduation program cross the line from private speech to public ritual.[7] The notion that publicly sponsored prayers become constitutional whenever the majority wants them is to say, in effect, that our constitutional safeguards, including the Establishment Clause, can be overruled by majority vote. That is not the premise of the Constitution and it has never been this Court's view.

Cross-petitioners make a similarly flawed argument when they contend that the disclaimer that appears on the written graduation Program somehow cleanses the constitutional violation occurring on the podium. However, this argument too has been consistently rejected by the Court, which has properly recognized that no amount of disclaim-

---

[7] Cross-petitioners make the same fundamental error in relying on *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), in support of their free speech claim as when they rely on *Board of Education v. Mergens*, 496 U.S. 226, in the context of free exercise. In both *Tinker* and *Mergens*, schools were constitutionally obligated to tolerate certain student speech on a nondiscriminatory basis. Nothing in those cases support what the students want to do here: compel the school to sponsor and finance their religious activity and include it in the school's own program. Indeed, *Tinker* and *Mergens* illustrate what Grangeville's response to this request should be.

ing "can blind us" to a clear Establishment Clause violation. *Stone v. Graham*, 449 U.S. 39, 41 (1980).

Finally, cross-petitioners argue that Grangeville's graduation ceremonies are public fora and, consequently, the students' religious practices cannot be subjected to "viewpoint-based speech restrictions." Cross-Pet. at 20. There is no basis in fact for claiming that this podium is a public forum. Indeed, the school district itself eschews the notion that it has created a public forum, given the responsibility the district would then have to open it to unfettered discourse.

"The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Neither by word nor deed has Grangeville opened its graduation podium to unlimited discourse. Public discourse does not occur. The only speech permitted is the religous majority's speech. As the Ninth Circuit correctly noted, "[n]o matter what message a minority of students may wish to convey, the graduation forum is closed to them." Pet.App. at B-27. This critical fact is not in dispute, and this fact precludes the graduation ceremony from being considered a public forum.

CONCLUSION

An undercurrent in the petition and cross-petition is that barring students from having the option to include religious activities in school programs is inimical to religion. On the contrary, the Establishment Clause is designed to safeguard religion from government (at the same time it safeguards government from religious strife). "[A] union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. at 431. Students who today vote to insert prayer can tomorrow vote to denigrate prayer, and the strife that is likely to erupt in the school (and in the community) is precisely what the Establishment Clause intends to prevent.

The decision below is a faithful application of a fundamental principle. Accordingly, respondents respectfully request that this Court deny the petition and cross-petition for *certiorari*.

Respectfully submitted,

Stephen L. Pevar
(*Counsel of Record*)
American Civil Liberties Union Foundation
6825 East Tennessee, Suite 530
Denver, Colorado 80224
(303) 321-4828

Steven R. Shapiro
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Dated: February 24, 1995

FILED
FEB 23 1995
OFFICE OF THE CLERK

(3)

No. 94-1268

In the

Supreme Court of the United States

October Term, 1994

Joint School District No. 241, et al,

Petitioners,

v.

Phyllis Wright Harris, on her own behalf and on behalf of her three children, Beverly Harris Butler, formerly Beverly Harris, Samuel Harris,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703)838-6712

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

BEST AVAILABLE COPY

19 pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amicus* 1

Reason for Granting the Writ 2

Argument

Introduction 4

I. The court of appeals decision is in direct conflict with the widely publicized Fifth Circuit decision in *Jones v. Clear Creek Independent School District*, thus creating great confusion for those attempting to comply with *Lee v. Weisman*. 5

II. The national publicity and community pressures ensuing from the decision in *Jones v. Clear Creek* and the conflict in the circuits generated by the decision below have created a divisive national controversy detrimental to the operation of public schools across the country. 6

Conclusion 13

TABLE OF AUTHORITIES

CASES: **PAGE**

Jones v. Clear Creek I.S.D.,
977 F.2d 963 (5th Cir. 1992),
cert. denied, 113 S.Ct. 2950 (1993) . . 5,6

Lee v. Weisman,
112 S. Ct. 2649 (1992) 2,3,5

OTHER AUTHORITIES:

"ACLU Says Medlock Wrong with
School Prayer Opinion," Columbia,
South Carolina Associated Press,
1/6/93 12

American Center for Law and Justice
Bulletin 8/21/92 7

American Center for Law and Justice
Bulletin 11/20/92 8

American Center for Law and Justice
Bulletin 1992-1993 8

American Center for Law and Justice
News Release 4/5/93 7,8

"An Open Letter to School Board Presidents and
School Superintendents on Freedom of Religion
and Prayer in Public Schools,"
April, 1994. 10

"Attorney General Disputes 'Loopholes' in
Ban on School Prayer: A law center
founded by TV evangelist Pat Robertson
claims that school districts can get
around the Supreme Court ruling on
school prayer," Ann Arbor News,
April, 1993 9

"Attorney General says Prayer at Athletic Events Legal," Rock Hill, South Carolina, Associated Press, 1/5/93 . . . 12

"Attorney Says Moment of Silence May Replace Graduation Prayer," Sheboygan, Wisconsin Associated Press, 4/14/93 9

"Board Opts for Students, not Clergy, to Lead Prayer at School Event," Dickinson, Texas, Associated Press, 2/23/93 9

"Can Religion, Graduation Mix?" UPI, 4/5/93 12

"Graduation Prayer Advocates Launch Self-Styled 'SWAT' Teams'," Education Daily, 4/6/93 9

"House Passes Bill for Policy on Prayer at School Athletic Events," Oklahoma City, Oklahoma, Associated Press, 3/13/93 . . 13

"Lawyer Attacks ICLA over Graduation Prayer Issue," Indianapolis, Indiana, Associated Press, 4/21/93 10

"Lexington School Board to Consider Reinstating Graduation Prayer," Lexington, Nebraska, Associated Press, 4/20/93 9

"Robertson Trying Again to Put Prayer in Schools," New York Times, 4/16/93 8

"School District Votes to Keep Prayer in Schools," Hilbert, Wisconsin, Associated Press, 1/20/93 9

"Students Can Decide Graduation Prayer Issue, Board Says," Goshen, Indiana, Associated Press, 4/13/93 9

"Students Considering Taking Prayer into Their Own Hands," Clearfield, Utah, Associated Press, 2/23/93 9

"Tennessee School Prayer: Senate Committee Gives Nod," Tennessean, 4/21/93 10

"Virginia Schools Struggle with Supreme Court Ruling on Prayer," Richmond, Virginia Associated Press, 4/19/93 11

No. 94-1268

In the

Supreme Court of the United States

October Term, 1994

Joint School District No. 241, et al.,

Petitioners,

v.

Phyllis Wright Harris, on her own behalf and on behalf of her three children, Beverly Harris Butler, formerly Beverly Harris, Samuel Harris,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

INTEREST OF THE *AMICUS*

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations,

the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands, Guam and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

REASON FOR GRANTING THE WRIT

The public schools are currently the site of religious warfare between advocates of prayer at graduation and other school events (who interpret this Court's decision in *Lee v. Weisman*, 112 S.Ct. 2649 (1992), narrowly to preclude only clergy-led prayer at graduation ceremonies) and those who interpret *Lee* broadly to preclude any direct involvement by school officials in prayer at any school event. This is not just a routine legal dispute. Both sides are using the public schools and public school children as tools to argue their respective sides of this issue.

School boards are caught in the middle and do not know which way to turn: Should they take the more conservative path and treat *Lee v. Weisman* as precedent in guiding their decisions -- thus risking the wrath of constituents who cite *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993), in support for their "right" to pray at graduation? Or do they follow the advice of lawyers for religious interests who argue that *Lee* has limited value as precedent, applying only to the facts in that case -- thus risking a lawsuit by parents of objectors to the prayers or by the American Civil Liberties Union (ACLU)? (The ACLU has threatened to file suit to protect the interests of those who do not support involvement of the schools in prayer at school events.) Only this Court can solve this dilemma; and NSBA urges the Court to do so, thus protecting the schools from the onslaught

of litigation and public dissension on this very emotional issue that has intensified and turned into a raging controversy since this Court denied *certiorari* in *Jones*.

ARGUMENT

Introduction

Although NSBA supports the petition in this case, it does not necessarily support the Petitioners and will not take a position in the event this Court grants the petition for *certiorari*, because its membership is split on the policy question related to student-led prayer. NSBA takes this unusual action because it believes that this issue cries out for a resolution. Each side, of course, purports to speak with authority as to the state of the law, thus adding more confusion than clarity to the debate. Those that support the school district's position to allow student-led prayer characterize their opponents as "anti-Christian," while those who contend that student-led prayer is

unconstitutional maintain that their opponents are knowingly violating the law of the land.

I. The court of appeals decision directly conflicts with the widely publicized Fifth Circuit decision in *Jones v. Clear Creek*, thus creating great confusion for those attempting to comply with *Lee*.

In *Jones v. Clear Creek*, the Fifth Circuit decision implied that *Lee v. Weisman* was wrongly decided and upheld the type of student-led prayer found unconstitutional by the Ninth Circuit's decision here. The conflict in the circuits created by the Ninth Circuit decision together with the intemperance of the Fifth Circuit's decision in *Jones* and the publicity engendered by advocacy groups have made judicious policymaking difficult, if not impossible. Even where school boards disagree as a matter of policy with particular court decisions, they still want to obey the law and therefore seek legal advice. After this Court's decision in *Lee*, many school lawyers across the country in addressing the variety of

factual questions that remained undecided took a conservative approach and advised their clients that direct school involvement in prayer at school activities would raise serious questions. In many communities, this cautious interpretation is being overwhelmed by conflicting legal advice that school boards are receiving from interest groups who elevate the importance of the *Jones* decision, inaccurately characterizing this Court's denial of *certiorari* as a decision on the merits.

II. The national publicity and community pressures ensuing from the decision in *Jones v. Clear Creek* and the conflict in the circuits generated by the decision below have created a divisive national controversy detrimental to the operation of public schools across the country.

The conflicting pressure imposed by organizations representing religious interests and those representing interests devoted to the "separation of Church and State" have turned public schools into battlefields.

One national Christian legal organization, the American Center for Law and Justice (ACLJ), has dispatched an army of "SWAT teams" to "battl[e] it out in the nation's school districts . . . in a nationwide campaign to educate students about their constitutional right to pray and speak out about God at graduation ceremonies . . ." ACLJ News Release, 4/5/93. The mission of this well-funded organization is to fight for prayer in the schools. Since this Court's decision in *Lee*, the American Center for Law and Justice has inundated every public school superintendent in the country with numerous bulletins containing the Center's legal analysis of *Lee*, *Jones*, the decision below and other school prayer issues.

An August 21, 1992 bulletin supported a "See You at the [flag]Pole" event for students to "offer prayers for their school, teachers, administrators and the nation." This letter described *Lee* as answering "only one question:

Can school officials invite a member of the clergy to offer a prayer at a school sponsored event?" A November 20, 1992 bulletin began with the proposition that "voluntary student-led prayer is constitutionally protected on public school campuses." It advocated student-led prayer at graduations and other school events. Another ACLJ bulletin sent to all public school districts in November of 1992 promoted the organization's views on Christmas observances. A bulletin dated "school year 1992-1993" included an analysis of both *Lee* and *Jones v. Clear Creek* and concluded that "students have the right to include an invocation and benediction in their graduation exercises."

The ACLJ also wages its religious crusade on other legal fronts. By its own account, the ACLJ is currently involved in disputes relating to student-led prayer in more than 130 school districts in some 25 states. ACLJ News Release, April 5, 1993. News reports

from across the country lend credence to this statement. *See, e.g.*, "Robertson Trying Again to Put Prayer in Schools," New York Times, 4/16/93; "School District Votes to Keep Prayer in Schools," Hilbert, Wisconsin Associated Press, 1/20/93; "Students Considering Taking Prayer into Their Own Hands," Clearfield, Utah, Associated Press, 2/23/93; "Board Opts for Students, not Clergy, to Lead Prayer at School Event," Dickinson, Texas, Associated Press, 2/23/93; "Attorney Says Moment of Silence May Replace Graduation Prayer," Sheboygan, Wisconsin, Associated Press, 4/14/93; "Students Can Decide Graduation Prayer Issue, Board Says," Goshen, Indiana, Associated Press 4/13/93; "Graduation Prayer Advocates Launch Self-Styled 'SWAT Teams'," Education Daily, 4/6/93; "Attorney General [of Michigan] Disputes 'Loopholes' in Ban on School Prayer: A law center founded by TV evangelist Pat Robertson claims that school districts can get around the Supreme Court

ruling on school prayer," Ann Arbor News, April, 1993; "Lexington School Board to Consider Reinstating Graduation Prayer," Lexington, Nebraska Associated Press, 4/20/93; "Tennessee Prayer: Senate Committee Gives Nod," Tennessean, 4/21/93; "Lawyer Attacks ICLU over Graduation Prayer Issue," Indianapolis, Indiana Associated Press, 4/21/93.

School districts have also received communications from religious groups opposing formalized student-led prayer. Over 500 religious leaders, representing over 500 churches and synagogues of various faiths in 44 states, signed an "open letter" to school board presidents and superintendents of schools, in response to statements by community officials urging that "prayer be returned to the public school systems of this nation," and to the "legal SWAT teams" advocating "so-called student-led, organized

prayer at public school graduations." The letter stated:

> As we approach public school graduations this year, we urge all people of faith to declare a permanent cease fire on this issue, and work to promote the true cause of religious liberty, including the separation of church and state. It is critical to our society and to the fundamental well-being and liberty of our children that these precepts of religious freedom be preserved, and that you, as educators, respect those principles. All of us must make every effort to prevent our public schools from becoming a battleground over religion and to promote true religious liberty.

"An Open Letter to School Board Presidents and School Superintendents on Freedom of Religion and Prayer in Public Schools," April, 1994.

In a number of states, school districts have received letters from both sides of the controversy. In Virginia, for example, both the American Civil Liberties Union (ACLU) and the ACLJ sent letters to school districts interpreting the *Jones* decision. "Virginia Schools Struggle with Supreme Court Ruling on

Prayer," Richmond, Virginia, Associated Press 4/19/93. The ACLU sent out a bulletin challenging ACLJ's interpretation to school districts in a number of other states. A spokesman for ACLU said recently that any school district relying on the advice of the American Center for Law and Justice "will get its pants sued," "Can Religion, Graduation Mix?," UPI, 4/5/93.

A similar issue to the one presented here is also causing a great deal of dissension in the schools: prayer at school athletic events. Both the ACLJ and the ACLU have taken positions on this issue paralleling their views on student-led prayer at graduation. ACLJ again interprets *Lee* as not reaching anything beyond clerical prayers at graduation, and ACLU interprets the case to preclude "school sponsored" prayers at any school event.

Meanwhile political activity is running rampant on this issue as well. "Attorney

General [of South Carolina] says Prayer at Athletic Events Legal," Rock Hill, S.C., Associated Press, 1/5/93; "ACLU Says Medlock Wrong with School Prayer Opinion," Columbia, S.C., Associated Press, 1/6/93; "House [in Oklahoma] Passes Bill for Policy on Prayer at School Athletic Events," Oklahoma City, OK, Associated Press, 3/13/93.

The national debate and legal machinations of interest groups have elevated the issue in this case to one of national importance. Public schools are accustomed to controversy, and the public often expects them to be the progenitors of solutions to some of society's most difficult and contentious social issues, *e.g.*, desegregation, AIDS, crime, drugs, and even asbestos. Perhaps the most wrenching issue of all, in any civilization, is the harmonious existence of many religions and the relationship of the state to them all. The schools need this Court's guidance to resolve the issue.

Conclusion

Amicus urges this Court to grant the petition for *certiorari* and to settle the intense controversy as to the permissible scope of official school district involvement in prayer at school functions.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association (NSBA)

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director